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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

In re Thomas R. Hutchinson, individually and as the Personal Representative of the Estate of Robert W. Hutchinson, deceased, and Anne E. Hutchinson, individually,

Petitioners.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED FOR REVIEW

Whether mandamus is an appropriate means of reviewing a judge's refusal to disqualify himself under 28 U.S.C. § 455 (a) or § 455(b)(1).

Whether public confidence in the judicial process is undermined by the summary denial of a petition for writ of mandamus seeking review of a judge's refusal to disqualify himself under § 455(a) or § 455 (b)(1).

Whether appellate judges who summarily denied a mandamus petition seeking review of a district judge's refusal to disqualify himself under § 455(a) or § 455(b)(1) should have disqualified themselves after they obtained actual knowledge of facts indicating their bias or interest.

Whether interlocutory rulings entered by a judge whose recusal is mandated by § 455 should be vacated if they favor the party favored by his bias, prejudice or partiality.

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PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully request that a writ of mandamus issue to review orders which were entered in In re Hutchinson, No. 94-1523[1] by three judges who sit on the United States Court of Appeals for the Seventh Circuit.[2]

ORDERS BELOW

Petitions for writs of mandamus which petitioners filed in the United States Court of Appeals for the Seventh Circuit

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[1] Parties to the mandamus proceeding in the Court of Appeals were Thomas R. Hutchinson and Anne E. Hutchinson, plaintiffs-petitioners; the Hon. Larry J. McKinney, respondent; and defendants-respondents Gordon Terhune Thompson, Margaret Ann Thompson Lynch, Ira Spanierman, Ira Spanierman, Inc., William E. Jageman, Jageman and McGraw, Inc., Robert H. Hahn, Bamberger, Foreman, Oswald and Hahn, and Rita Deere.

[2] These three judges are persons against whom relief is sought in this Court. Their names are Hon. Richard D. Cudahy, Hon. Frank H. Easterbrook, and Hon. Michael S. Kanne; each is a Circuit Judge in the United States Court of Appeals for the Seventh Circuit.

on January 25[3] and March 11, 1994, were disposed of by unpublished order on August 5, 1994. This order is reprinted in the appendix at 1a - 2a. The court's order directing the clerk to file petitioners' tendered reply brief was entered July 27, 1994; it is reprinted in the appendix at 3a. The petition for rehearing was denied by order dated October 14, 1994; it is reprinted in the appendix, at 4a.

Orders rendered by the district court in the underlying civil actions are not reported, but are reprinted in the separate appendix, at 5a - 84a.

The Seventh Circuit opinion in Godlove v. Bamberger, Foreman, Oswald and Hahn is reported at 903 F.2d 1145 and reprinted in the separate appendix, at 85a - 103a.

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[3] This mandamus petition sought review of the district judge's order disqualifying petitioners' counsel under the advocate-witness rule. This Court is not being asked to determine whether that ruling was "right or wrong."

JURISDICTION

This Court may exercise its original jurisdiction under 28 U.S.C. § 1651(a) to review an appellate panel's summary denial of a mandamus petition seeking review of a district judge's refusal to disqualify himself and its order denying the petition for rehearing which petitioners filed.

CONSTITUTIONAL PROVISIONS, STATUTES AND PROCEDURAL AND COURT RULES INVOLVED

United States Constitution:

Amendment V

United States Code, Title 28:

§ 455. Disqualification of justice, judge or magistrate

§ 1651. Writs

§ 2106. Determination

Federal Rules of Civil Procedure:

Rule 16. Pretrial Conferences; Scheduling; Management

Rule 55. Default

Rule 56. Summary Judgment

Indiana Rules of Professional Conduct:

Rule 3.7. Lawyer as Witness

STATEMENT OF THE CASE

The underlying civil actions were filed in the United States District Court for the Southern District of Indiana on April 2, 1990. The relief sought in the first of these actions was an order vacating a 1988 judgment for fraud upon the court. In the second, petitioners asserted fraud and malpractice claims against law firms and lawyers who had represented them in the prior litigation and fraud and RICO claims against a New York art dealer who had been a defendant in that litigation.

Basis for Federal Jurisdiction

The subject matter jurisdiction of the United States District Court for the Southern District of Indiana was invoked under 28 U.S.C. § 1332. Petitioners Anne E. Hutchinson and Thomas R. Hutchinson were citizens of the State of Washington when the pending cases were filed. Those

named defendants were citizens of other states: Robert H. Hahn, Rita Deere, and members of Bamberger, Foreman, Oswald and Hahn, a partnership, were citizens of Indiana, as was Gordon Terhune Thompson and Ann Thompson Lynch's predecessor in interest; William E. Jageman was a citizen of California, as was Jageman and McGraw, Inc., a dissolved corporation; Ira Spanierman was a citizen of New York, as was Ira Spanierman, Inc., a dissolved corporation. The amount in controversy in each case exceeded $50,000.00.

Facts Material to Consideration of the Questions Presented

Nexus between pending cases and prior litigation

In 1980, petitioners' father, Robert Hutchinson ["Hutchinson"], filed a partition action against his cousin, Margaret Thompson ["Thompson"], to enforce a right recognized under Indiana law: division of personal property they held as tenants in

common. The following year, New York art dealer Ira Spanierman and Ira Spanierman, Inc. were joined as defendants so paintings and other objects from the Theodore Robinson Collection[4] which the art dealer had obtained from Thompson without her cotenant's knowledge or consent, could be divided and set off in severalty.

In 1988, the Chief Judge of the United States District Court for the Southern District of Indiana ruled on dispositive motions the art dealer and Thompson filed in 1981 and 1982, decided that abstention under Burford v. Sun Oil Co., 319 U.S. 315 (1943), was appropriate, and dismissed the partition action.

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[4] What is referred to in the prior and pending litigation as "the Theodore Robinson Collection" consists of more than 200 works of art created or owned by Theodore Robinson, foremost of American Impressionist artists and a close friend of Claude Monet, at the time of his death. The collection was inherited by Hamline Robinson, the artist's older brother and one of his heirs.

Robert H. Hahn ["Hahn"], the lawyer who represented Hutchinson in that litigation, dissuaded petitioners from appealing the dismissal by telling them that pursuing such a course could subject their father's estate to the imposition of sanctions.

In March 1990, when petitioners learned of Ira Spanierman's announced intention to publish a catalogue raisonné of Robinson's works and became suspicious of representations Hahn had made in 1988, they located then contacted Joan Godlove ["Godlove"], who had served as their father's lawyer between January 1981 and July 1983, when she was fired by the Bamberger, Foreman, Oswald and Hahn ["Bamberger"] firm. The pending actions were filed several weeks later.

"Extrajudicial sources" of the district and appellate judges' bias and partiality

After being served with suit papers, the petitioners' former lawyer and his law

firm asked the Chief Judge to disqualify Godlove under the advocate-witness rule, Ind. R. Prof. Conduct 3.7, and enter "an order precluding [her] or any other attorney associated with the firm of Roberts, Marrs & Carson from acting as an advocate for or counsel to plaintiff in any matter relating to the claims asserted or which may be asserted . . . ."

Attached to Hahn's affidavit, which was filed in support of the Bamberger firm's motion, were copies of opinions rendered in Godlove v. Bamberger, Foreman, Oswald and Hahn, No. EV 85-192-C (S.D. Ind. July 7, 1989), by the Hon. William L. Beatty[5] and the Seventh Circuit, No. 89-2722 (7th Cir. 1990), reprinted at 903 F.2d 1145, cert. denied, 499 U.S. 913 (1991).

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[5] Judge Beatty, United States District Judge for the Southern District of Illinois, was assigned to this case after every judge in the Southern District of Indiana recused himself or herself sua sponte. 903 F.2d at 1145 n.*.

Because each of the Godlove opinions was critical[6] of petitioners' counsel, but contained no finding or holding[7] that was relevant to issues raised by defendants' motions[8] to disqualify Godlove under the advocate-witness rule, petitioners identified them as "extrajudicial sources" of the prejudice displayed by the successor

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[6] The author of the Seventh Circuit opinion dubbed Godlove "a fool" and trivialized her request that the Bamberger firm be required to notify its clients, including petitioners, of her asserting the attorney-client privilege and work-product doctrine on their behalf (separate appendix at 86a, 94a) so she could determine whether each would consent to disclosure of the information sought.

[7] Each opinion focused on Godlove's failure to produce documents which she had claimed were protected by the attorney-client privilege and work-product doctrine and the dismissal of her retaliatory discharge action as the ultimate discovery sanction.

[8] In March 1991, Spanierman filed a motion in the fraud on the court case in which he adopted the Bamberger firm's motion to disqualify petitioners' counsel. He and William E. Jageman, another of petitioners' former lawyers, as well as Jageman's firm, filed similar motions in the second case later that year.

district judge,[9] when they sought his disqualification under 28 U.S.C. § 455(a) and § 455(b)(1) in April 1993.

Circuit judges who are the subject of the instant petition were asked to find that the trial and appellate opinions in Godlove v. Bamberger, Foreman, Oswald and Hahn constituted "extrajudicial sources" of the district judge's bias and prejudice then issue a writ requiring his recusal. Two of those judges, the Honorable Frank H. Easterbrook and the Honorable Michael S. Kanne, had participated in the Seventh Circuit's decision in Godlove. They were being asked to determine an issue of fact in which each had a personal interest.

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[9] The Chief Judge disqualified himself sua sponte under § 455(b)(1) in December 1991, seven months after he entered a series of ex parte orders relieving defendants of their duty to respond to discovery requests served on them under Rules 33, 34, and 36 of the Federal Rules of Civil Procedure until 30 days after he ruled on their motions to disqualify Godlove.

Factual basis for petitioners' bias and partiality motion in the District Court

The following facts (which tend to show not just adverse rulings, but bias or partiality) were asserted as grounds for the successor district judge's recusal:

1. Although the judge denied Ira Spanierman's motion to disqualify Godlove in the fraud on the court case, he stressed that Godlove, Roberts and Marrs were to conduct no discovery which is to be utilized in the malpractice and fraud case (separate appendix at 40a).

2. In the order denying Ira Spanierman's disqualification motion, the judge also "put[] plaintiffs' counsel on notice that if it comes to their attention that any of the four are likely to be called as a witness, plaintiffs' counsel must withdraw from the case immediately (separate appendix at 40a).

3. When the judge asked petitioners' counsel "to consider carefully whether attorney Godlove will be called as a witness -- either during the plaintiff's case in chief, in rebuttal, or reasonably by defendants in their case in chief," (separate appendix at 40a), he ignored evidence in the record in that case, namely:

> Counsel for the Spanierman defendants have never stated on the record or told plain-

tiff's counsel (a) that they intend to call any of the attorneys who are the targets of their clients' Motion to Disqualify Counsel (i.e., Joan Godlove and other attorneys associated with Roberts, Marrs and Carson) to testify on behalf of their clients at trial or (b) that testimony they expected to elicit from plaintiff's counsel at trial, if defendants called them to testify, would be prejudicial to plaintiff's case.

Counsel for the Spanierman defendants has never informed plaintiff's counsel who he expects to elicit testimony from Ms. Godlove which "does not relate to an uncontested issue" or what "the testimony" is.

Plaintiff has no reason to call Joan Godlove or any other attorney associated with the Roberts, Marrs & Carson firm to testify at the trial of the underlying partition action, if the Court vacates the judgment in Hutchinson v. Day on the ground that it was obtained by fraud upon the court.

Plaintiff Thomas R. Hutchinson will not call his attorneys to testify on his behalf at the trial of the underlying partition action, if the Court vacates the judgment in Hutchinson v. Day for fraud

upon the court. However if the Court determines that specialized knowledge of the law applicable to partition actions "will assist the trier of fact to understand the evidence or to determine a fact in issue," Fed.R.Evid. 702, plaintiff will offer the testimony of an expert witness, not the testimony of one of his attorneys.

Even if Joan Godlove or another attorney associated with Roberts, Marrs & Carson was called to testify at trial by the Spanierman defendants' attorneys, the testimony plaintiff's lawyers could give would not be prejudicial to plaintiff's case.

None of plaintiff's attorneys has personal knowledge of the operative facts giving rise to plaintiff's underlying partition action or the conduct of one or more attorneys of record in Case No. EV 80-104-C, which constituted fraud upon the court.

4. Findings of fact set forth in the order disqualifying Godlove and two other attorneys in the second case establish that the movants had not sustained burdens placed on them by Rule 3.7(a) of the Indiana Rules of Professional Conduct as to plaintiff's malpractice, fraud and constructive fraud claims (separate appendix at 51a - 57a).

5. When defendants in the malpractice and fraud action failed to make the showing required by Rule 3.7, the judge disregarded that fact, then made an unsupported finding that the substance of a telephone call made in April 1990 was "in dispute" in order to conclude that Godlove and two other attorneys would have to testify about that call at trial and could not represent plaintiff on any claim (separate appendix at 57a - 59a, 65a). To draw this conclusion, the judge disregarded sworn statements in the record that Tom Hutchinson had no reason to call Godlove to testify in that case; that she would not testify as a witness for him; and that if she was called by any defendant, her testimony would not be prejudicial to her client.

6. The district judge denied the pro se litigants' motion to reconsider and vacate his order disqualifying Godlove, and then directed them to respond to the summary judgment motion Hahn and the Bamberger firm filed three weeks after the judge had deprived Hahn's former clients of counsel (separate appendix at 70a). The summary nature of the ruling does not disclose the basis for the judge's decision or if consideration was given to grounds advanced in support of the motion to reconsider:

   (a) in making its decision, the court did not consider petitioners' motion or reply brief;

(b) the court's conclusion that Godlove must be disqualified as to the malpractice and RICO claims is not supported by evidence in the record; and

(c) justice and fair play require that the order disqualifying Godlove on grounds that "she was likely to be a necessary witness at trial" be vacated so that petitioners would not be forced to proceed pro se by economic constraints, but could be represented by counsel on the summary judgment motion Hahn and his law firm filed three weeks after the court entered that order.

7. When the judge denied Plaintiff's Motion to Vacate Orders Staying Discovery, he accepted, as valid, ex parte orders staying discovery which the Chief Judge entered in 1991, in violation of petitioners' due process rights.

8. When the judge denied Plaintiffs' Second Motion for Relief Under Rule 37(d), he accepted, as valid, ex parte orders staying discovery which the Chief Judge entered in 1991 in violation of petitioners' due process rights.

9. When the judge continued the stay beyond the time contemplated by the Chief Judge's ex parte orders, without first consulting with the pro se petitioners by a scheduling conference, telephone, mail or other suitable means (separate

appendix at 77a - 79a [summary of ex parte stay orders]) he violated their due process rights and express provisions of Rule 16(b).

10. When, four weeks after lifting the ex parte stay entered by the Chief Judge in the fraud on the court case seventeen months earlier, the judge entered an ex parte order staying discovery until he ruled on the summary judgment motion in the malpractice case, he violated petitioners' due process rights (separate appendix at 72a - 74a).

11. The judge refused to take judicial notice of Plaintiff's Offer of Proof Regarding Motive for Perpetrating Fraud Upon the Court because it was signed by Godlove, not because he had reviewed the documentary evidence it contained and found it irrelevant.

12. In denying Plaintiff's Motion for Imposition of Sanctions Under Rule 11 and 28 U.S.C. § 1927 for Filing Frivolous Motions to Disqualify Counsel and Stay Discovery, the judge found that the defendants' motions to disqualify counsel were well-founded, as evidenced by his disqualification order, and that "plaintiff's request to stay discovery is extraneous, given that all discovery is already stayed." The latter finding discloses that the judge based his ruling on the title of plaintiff's motion. [His later effort to explain this ruling, i.e., a critical phrase had been inadvertently deleted, (separate appendix at 20a - 22a) raises

other questions under § 455.][10]

13. Two motions for entry of default and entry of default judgment under Rule 55 were filed after Ira Spanierman failed to respond to pleadings filed in the fraud on the court case within the time allowed, first by order, then by Rule 12(a)(4)(A). None of these motions was granted. With regard to the first set, the successor judge permitted Spanierman to file a Rule 12(b) motion out of time.

14. Although he required petitioners to respond to a motion to dismiss which he allowed Spanierman to file after he was in default, the successor judge indefinitely extended the time for Spanierman to respond to a Rule 56(a) motion which petitioners initially filed in the fraud on the court case on March 13, 1991, and then renewed November 30, 1992.

Relief sought in the Seventh Circuit

The writ petitioners asked the Seventh Circuit to enter under 28 U.S.C. § 1651(a) would have compelled the successor judge

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[10] Page limitations prevent petitioners from describing additional manifestations of alleged bias or prejudice which arise from rulings and comments made by the successor judge after he was asked to disqualify himself.

to disqualify himself and vacate orders he had entered in defendants' favor.

Relief which petitioners sought under 28 U.S.C. § 2106 was an order vacating a series of ex parte orders which the Chief Judge entered before disqualifying himself under 28 U.S.C. § 455(b)(1).

REASONS FOR ISSUANCE OF THE WRIT

1. Mandamus is appropriate where a judge refuses to disqualify himself under 28 U.S.C. § 455.

Most circuit courts have held that mandamus is an appropriate means of reviewing a judge's refusal to disqualify himself.[11]

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[11] See, e.g., In re United States, 666 F.2d 690, 694 (1st Cir. 1981); In re IBM Corp., 618 F.2d 923, 926-27 (2d Cir. 1980); Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 163 (3d Cir. 1993); In re Rodgers, 537 F.2d 1196, 1197 n.1 (4th Cir. 1976); In re Corrugated Container Antitrust Litig., 614 F.2d 958, 961 n.4 (5th Cir.), cert. denied, 449 U.S. 888 (1980); In re Aetna Casualty and Surety Co., 919 F.2d 1136, 1139-43 (6th Cir. 1990) (en banc); SCA Services, Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977); Liddell v. Board of Educ., 677 F.2d 626, 643 (8th Cir.), cert. denied sub nom Missouri v. Liddell, 459

The issue is one of first impression for this Court, however.

a. **Adequate relief cannot be obtained from any other federal court or in any other form.**

Petitioners acknowledge they must not only show a "clear and indisputable" right to issuance of the writ, Will v. United States, 389 U.S. 90, 96 (1967), but also have no other adequate means to obtain the desired relief, Kerr v. United States District Court, 426 U.S. 394, 403 (1976). Still, exercise of this or any other appellate court's power under the All Writs Act, 28 U.S.C. § 1651(a) (1994), is largely discretionary. Kerr v. United States District Court, 426 U.S. at 403.

U.S. 877 (1982); In re Cement Antitrust Litig., 673 F.2d 1020, 1025 (9th Cir. 1982), cert. denied for want of quorum, 459 U.S. 1190 (1983); Bell v. Chandler, 569 F.2d 556, 559 (10th Cir. 1978); In re Barry, 946 F.2d 913, 914 (D.C. Cir. 1991) (dictum). Presumably the Eleventh Circuit would follow pre-split precedents of the Fifth Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1209-11 (11th Cir. 1981).

Courts considering the question have rejected the notion that interlocutory and final appeals provide a presumptively adequate means of reviewing disqualification decisions. See, e.g., In re School Asbestos Litigation, 977 F.2d 764 (3d Cir. 1992), where the rationale underlying the court's decision was explained as follows:

> [W]e believe section 455 reflects Congress's view that the adjudication of a case by a judge with an actual or apparent bias is an "abuse of judicial power," Roche [v. Evaporated Milk Association, 319 U.S. 21,] 31 [(1943)], because it is a threat to the integrity of the judicial system. Interlocutory review of disqualification issues on petitions for mandamus is both necessary and appropriate to ensure that judges do not adjudicate cases that they have no statutory power to hear . . . .

977 F.2d at 778 (emphasis in original).

The adequacy of an appeal from a final judgment entered by a judge who should have disqualified himself under Section 25 of the Judicial Code was considered and decided by the Court in Berger v. United

States, 255 U.S. 22 (1921), in the course of answering questions certified by the Seventh Circuit:

> The remedy by appeal is inadequate. It comes after the trial and if prejudice exist it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of mind in which there is a personal ingredient.

255 U.S. at 36.

What was said in Berger under the predecessor to 28 U.S.C. § 144 should be equally applicable today under 28 U.S.C. § 455: the remedy by appeal from a final judgment is inadequate.

Nor does interlocutory appeal under 28 U.S.C. § 1292(b) appear to be an adequate remedy for a district judge's refusal to disqualify himself. As the Third Circuit noted in In re School Asbestos Litigation:

> All three of [the] requirements [imposed by § 1292(b)] pose obstacles to the use of interlocutory appeal to review a district judge's refusal to disqualify himself or herself.

> Perhaps in some cases the necessity of disqualification can be deemed a "controlling question of law," notwithstanding that it is a fact-intensive, somewhat discretionary issue collateral to the merits. Even so, a district judge's refusal to disqualify necessarily indicates a belief that his or her partiality cannot reasonably be questioned. In many, if not all, cases that will in turn suggest that the district judge believes that there is no "substantial ground for difference of opinion" regarding the need to disqualify. Furthermore, disqualification may slow, not speed, the progress of a case to final judgment. Finally, as a practical matter, some district judges may consider a demand for disqualification as a personal attack (even if the motion is not meant as such) and may, therefore, be less inclined to certify the issue if they believe that disqualification is not required.

977 F.2d at 777; see also Wesley Kobylak, Annot., Review of Federal Judge's Grant or Denial of Motion to Recuse, 64 A.L.R. Fed. 433, 439 (1983) ("while interlocutory appeal is generally not available in the context of recusal motions, the rare cases in which it has been granted are uniformly where the recusal has been granted").

What has been said thus far relates to review of a district judge's refusal to disqualify himself or herself, not the refusal of circuit judges to do likewise.

The petitioners have exhausted remedies available to them in the district and circuit courts. They filed a motion seeking disqualification of the successor judge under § 455(a) or § 455(b)(1). Upon his refusal to recuse, they sought review of his decision in the Seventh Circuit under 28 U.S.C. § 1651(a). After their mandamus petition was denied summarily, they filed a petition for rehearing and suggestion for rehearing in banc which raised the following issues, among others:

> Public confidence in the judiciary will be undermined unless this Court identifies the basis for its denial of the March 11, 1994, petition and explains why none of the grounds asserted required disqualification.
>
> The Court appears to have overlooked qualifying language in Liteky and mistakenly concluded that judicial rulings cannot form the basis for a § 455 motion but should be appealed.

The Court's impartiality "might reasonably be questioned" under 28 U.S.C. § 455(a) where it decided issues the parties raised in their Petition and Response without first considering Petitioners' Reply Brief and related appendix.

Two of the three judges who entered the Order should have disqualified themselves under 28 U.S.C. § 455(a) upon learning that they were being asked to find that their prior opinion in Godlove v. Bamberger, Foreman, Oswald and Hahn constituted an "extrajudicial source" for Respondent's unreasoning prejudice.

Disqualification of the third member of the panel which entered the Order may be necessary to avoid the appearance of impropriety.

Respondent Judges Cudahy, Easterbrook, and Kanne refused petitioners relief under 28 U.S.C. § 455 and Rule 40 of the Federal Rules of Appellate Procedure by declining to disqualify themselves and denying their petition for rehearing. By their silence and inaction, the remaining members of the Seventh Circuit denied petitioners relief available to them under yet another rule of appellate procedure, i.e., a rehearing in banc. See Fed.R. App.P. 35(b).

The only remaining avenue of relief is review by this Court under the All Writs Act of (1) the orders entered by Circuit Judges Cudahy, Easterbrook and Kanne denying petitioners' mandamus petition and petition for rehearing and (2) "facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice," Ex parte American Steel Barrel Co., 230 U.S. 35, 43-44 (1913), or partiality on the part of the trial and appellate judges.

Like Napoleon III who ordered an exhibition of the works of the Impressionists who had been "refused wall space at the official, aridly academic biennial Salon shows in Paris . . . -- the Salon des Refusés -- so that the excluded works might have a public showing,"[12] this Court

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[12] Helen Dudar, Impressionism's hard yet glorious formative years, 25 Smithsonian 79, 79 (Nov. 1994).

should grant petitioners' writ and order a kind of "legal salon de refusés"[13] so that arguments made, but rejected by four federal judges, i.e., that petitioners have been deprived of rights guaranteed them by the Fifth Amendment and 28 U.S.C. § 455, might have a public hearing.

b. **The writ will be in aid of the Court's appellate jurisdiction.**

Unless the Court exercises its original jurisdiction at this time, the petitioners will be unable to invoke its appellate jurisdiction at a later date. The reasons for this are six in number.

First, with regard to appellate review of orders denying partiality motions, the Seventh Circuit adheres to a "mandamus-or-

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[13] The quoted phrase should not have been used to describe the Court's denial of more than 1600 petitions for writ of certiorari last October. Compare Linda Greenhouse, High Court Opens Its Fall Season by Refusing Cases, N.Y. Times, Oct. 4, 1994, at A4 with article cited in footnote 12, supra.

nothing" approach.[14] See In re School Asbestos Litig., 977 F.2d 777 n.12. It permits post-final-judgment appeals in cases of actual or imputed bias under 28 U.S.C. §§ 144 and 455(b)(1), but refuses to hear them for appearance-of-partiality claims under § 455(a). Id. (citing Durhan v. Neopolitan, 875 F.2d 91, 96-97 (7th Cir. 1989); United States v. Balistrieri, 779 F.2d 1191, 1204-05 (7th Cir. 1985)). But see Liljeberg v. Health Services Acquisition Corp., 486 U.S. 845, 862-69 (1988) (affirming vacatur of final judgment on Rule 60 motion for new trial based on district judge's failure to disqualify himself under 28 U.S.C. § 455(a)).

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[14] Indeed, that court has held that the issue of whether a judge should have recused himself under § 455(a) is waived if not raised in a mandamus action. See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc. ["Lac Du Flambeau Indians"], 991 F.2d 1249, 1955 (7th Cir. 1993); United States v. Towns, 913 F.2d 434, 443 (7th Cir. 1990) (collecting cases).

The second as well as the third reason petitioners will be unable to invoke this Court's appellate jurisdiction are related to the first. Reason number two is that the district judge did not decide if disqualification was mandated under 28 U.S.C. § 455(b)(1), as petitioners asked him to do; instead, he specifically limited his ruling to whether § 455(a) required his recusal (separate appendix at 7a - 8a).

Reason number three is that, having unsuccessfully challenged the successor district judge's refusal to disqualify himself under § 455(a) in a mandamus action, petitioners are precluded by the Seventh Circuit's "mandamus-or-nothing" rule and the law of the case doctrine[15]

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[15] Although an amorphous concept, the law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618 (1983).

from pressing the same issue on a post-final-judgment appeal.

The fourth and fifth reasons issuance of the writ would be in aid of the Court's appellate jurisdiction are linked to one another; they, in turn, are related to reason number two.

Reason number four concerns the failure of Circuit Judges Cudahy, Easterbrook, and Kanne to subject the trial judge's refusal to recuse for actual or imputed bias under § 455(b)(1) to de novo review, as Seventh Circuit practice dictates.[16] Two inferences can be drawn from this fact. First, they did not consider whether disqualification under § 455(b)(1) was mandated. Second, they rejected, albeit silently, petitioners' argument that the district

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[16] See, e.g., United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985), cert. denied sub nom. DiSalvo v. United States, 475 U.S. 1095 (1986); accord, Lac Du Flambeau Indians, 991 F.2d at 1255.

judge lacked discretion to limit his analysis of their motion to § 455(a).

Reason number five is that although petitioners are not barred by Seventh Circuit precedent from raising the issue of whether recusal was mandated under § 455(b)(1), the law of the case doctrine may serve as a bar to meaningful reconsideration of that issue on appeal.

The sixth and final reason issuance of the writ will be in aid of this Court's appellate jurisdiction relates to the fact that the issue of whether Judges Cudahy, Easterbrook, and Kanne should have recused themselves will be moot if not considered and decided now.

c. **Exceptional circumstances which are present warrant exercise of the Court's discretionary power.**

Subsequent to the denial of their petition for rehearing, petitioners learned that the actions which have been pending

in the United States District Court for the Southern District of Indiana since April 1990 have now been transferred to a third district judge, one who was recently appointed to the federal bench. They have also been given notice that, unless persuaded otherwise, he intends to leave in place the ex parte stay order[17] which his predecessor entered August 17, 1993 (separate appendix at 83a - 84a), concurrent with the order which denied petitioners' § 455 motion.

Numerous interlocutory orders, including ex parte discovery, scheduling, and stay orders, which the Chief Judge and his successor entered between April 1991 and August 1993, have now been "fortified by presumptions," Berger v. United States,

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[17] This ex parte order stayed all proceedings in the malpractice and RICO action until after a final decision is rendered in the fraud on the court case (separate appendix at 75a - 81a).

255 U.S. at 36, as a result of the summary disposition of the petition for writ of mandamus and petition for rehearing which petitioners filed in the United States Court of Appeals for the Seventh Circuit.

If, as petitioners contended in the District Court and the Court of Appeals, those and other orders were entered by the Chief Judge and his successor in violation of § 455 or their Fifth Amendment right to "due process," appropriate remedies should be fashioned by this Court[18] or by circuit judges whose impartiality cannot "reasonably be questioned," 28 U.S.C. § 455, so justice can be accomplished and public confidence in the judicial process can be restored.

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[18] The task of fashioning remedies that will best serve the purpose of § 455 has been delegated to the judiciary. Liljeberg, 486 U.S. at 862. In many cases, the Court of Appeals "is in a better position to evaluate the significance of a violation than this Court." Id. This, however, may not be one of those cases.

2. **Public confidence in the federal courts will be undermined if the Court does not require appellate judges to identify the basis for their denying mandamus petitions seeking review of district court decisions against recusal.**

Far more is at stake here than whether decisions made by four federal judges are legally supportable under § 455. At issue is the integrity of the judicial process and whether this Court will exercise its supervisory powers to promote or restore confidence in the federal courts.

a. **The purpose of §455(a) is to promote public confidence in the judiciary.**

Concerns about judicial integrity, particularly suspicions and doubts held by those who have not served on the bench,[19] find expression in § 455(a), the purpose of which "is to promote confidence in the judiciary by avoiding even the appearance

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[19] These concerns also have a constitutional dimension. See Liljeberg, 486 U.S. at 864-64 & n.12 (citing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986)).

of impropriety whenever possible." Liljeberg, 486 U.S. at 865. "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986).

b. Suspicions and doubts about the impartiality of a federal judge cannot be quelled if this Court does not require more of courts asked to review § 455 decisions than summary dispositions.

To satisfy the appearance of justice and promote confidence in the judicial system, "it is critically important [for reviewing courts] to identify facts that might reasonably cause an objective observer to question [another federal judge's] impartiality" under § 455(a). Liljeberg, 486 at 865. This is not merely to be done in conference; those facts should see the light of day in reported decisions. Id. (implied). Only by airing them in public and applying the principles enunciated in Liteky v. United States, 114 S.Ct. 1147,

127 L.Ed.2d 474 (1994), and Liljeberg can confidence in the judicial process be promoted or restored, as the case may be.

Confining such facts or equally unimpressive allegations of bias or partiality to smoke filled rooms or smoke free environs will have just the opposite effect. For this Court to allay doubts about the impartiality of federal judges and "quell the concerns of the skeptic," Liljeberg, 486 U.S. at 865 n.12, it must ask more of Courts of Appeals called upon to review decisions against disqualification. Were it to allow respondents' summary disposition to stand, confidence in the judicial process would be eroded, not promoted.

Nothing in the Court's Liteky opinion suggests that decisions denying § 455(a) (or § 455(b)(1)) motions are to be given short shrift by an appellate court asked to review those decisions via post-final-judgment appeal or mandamus. What was said seems to counsel Courts of Appeals to

consider carefully, if not de novo, each factual ground asserted in a § 455 motion and other manifestations of alleged bias raised for the first time on appeal:

> Applying the principles we have discussed to the facts of the present case is not difficult. None of the grounds petitioners assert required disqualification. As we have described, petitioners' first recusal motion was based on rulings made, and statements uttered, by the District Judge during and after the 1983 trial; and petitioner Bourgeois' second recusal motion was founded on the judge's admonishment of Bourgeois' counsel and codefendants. In their briefs here, petitioners have referred to additional manifestations of alleged bias in the District Judge's conduct of the trial below, including the questions he put to certain witnesses, his alleged "antidefendant tone," his cutting off testimony said to be relevant to defendants' state of mind, and his post-trial refusal to allow petitioners to appeal in forma pauperis.

Liteky, 114 S.Ct. at 1157-58, 127 L.Ed.2d at 491.[20]

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[20] Those concurring in the judgment noted that the Court described "in all necessary detail the unimpressive allegations of partiality and the appearance thereof" in Liteky. 114 S.Ct. at 1163; 127 L.Ed.2d at 491.

Where, as in the present case, parties invoke different provisions of § 455 and the due process clause of the Fifth Amendment, then assert a number of grounds for disqualification, each of those grounds should be addressed and analyzed in the district court's opinion. See Spangler v. Sears, Roebuck and Co., 759 F.Supp. 1327, 1329-31 (S.D. Ind. 1991) (implied). Where review of an order against recusal under § 455 is sought, Courts of Appeals should follow the same procedure. See Liljeberg, 486 U.S. at 861 (implied).

Only by issuing the writ petitioners seek in this original action can the Court signal its willingness to enforce § 455 and further the purpose to be served by that statute. This, in turn, "may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly dis-

close them when discovered." Lilejeberg, 486 U.S. at 868.

If the administration of justice is to "reasonably appear to be disinterested as well as be so in fact." Public Utilities Comm'n of D.C. v. Pollak, 343 U.S. 451, 466-67 (1952) (Frankfurter, J., in chambers), the Court must expressly disapprove of the summary disposition of any decision against disqualification under § 455. "To sustain such a course of procedure would give it encouragement." Offutt v. United States, 348 U.S. 11, 15 (1954); cf. United States v. Harris, 558 F.2d 366, 374-75 (7th Cir. 1977) ("we should not adopt a rule which will have the natural and probable effects of encouraging trial judges to avoid giving reasons for sentencing decisions and diminishing the individual offender's confidence in the fairness and objectivity of a critical step in the criminal justice process").

Unless the Court requires respondents to identify their reasons for denying the mandamus petition and explain why none of the grounds alleged required the successor district judge to disqualify himself, the confidence of petititioners, as well as the American people, in the fairness and the objectivity of federal judges will be shaken to its very core.

3. **Disqualification is required under § 455 where the facts tend to show not just adverse rulings, but bias, prejudice, or partiality.**

As it now stands, the public and petitioners alike are left to speculate about why their mandamus petition was denied by Circuit Judges Cudahy, Easterbrook, and Kanne. One possibility[21] is that all three

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[21] A second explanation for the summary denial may be that the panel relied on arguments in defendants' Response, and then found, contrary to express provisions of § 455(e), that petitioners waived their right to ask the successor judge to disqualify himself under § 455(b)(1) or seek appellate review of his refusal to do so.

merely gave lip service to qualifying language found in Liteky and then concluded, as Judge Cudahy did in another post-Liteky decision, that "[a]dverse rulings should be appealed; they do not form the basis for a recusal motion." In re Huntington Commons Assoc., 21 F.3d 157, 158 (7th Cir. 1994) (Cudahy, J.) (emphasis added). But see Liteky, where language the Court used was couched in terms of grays, not black and white:

> [J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion. See United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extra-

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A third possibly is that respondents decided, as defendants urged them to do, that petitioners' § 455 motion or their mandamus petition was untimely. Related matters are addressed on pages 60 - 61, infra.

> judicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal.

114 S.Ct. at 1157, 127 L.Ed.2d at 490-91 (emphasis added).

Circuit Judge Cudahy and the Seventh Circuit are not alone in their reading of Liteky, at least insofar as it relates to the niche reserved for adverse judicial rulings in recusal jurisprudence. See United States v. Bertoli, 40 F.3d 1384, 1412, 1413 (3d Cir. 1994); United States v. Chischilly, 30 F.3d 1144, 1149 (9th Cir. 1994). The Third and Ninth Circuits, however, have not chosen to speak in terms of absolutes, i.e., adverse rulings "do not form the basis for a recusal motion," as the Seventh Circuit did in Huntington. Nonetheless, it is clear that all three circuits have now taken the position that virtually every adverse judicial ruling which is alleged as a ground for recusal "properly can be reviewed upon appeal."

See United States v. Bertoli, 40 F.3d at 1413; accord, United States v. Chischilly, 30 F.3d at 1149 (implied); In re Huntington Commons Assoc., 21 F.3d at 158 ("[a]dverse rulings should be appealed").

a. **Appellate review of adverse rulings will not cure the Court of Appeals' failure to provide petitioners with a neutral and detached judge in the first instance.**

If other federal courts read Liteky, as have the Third and Seventh Circuits, and join them in holding that adverse rulings alleged in § 455 motions as grounds for disqualification properly can be reviewed on appeal, then Liteky, as applied, and Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972), are on a collision course.

The question presented in Ward was the constitutionality of the Mayor's participation in the adjudication and punishment of a defendant charged with two traffic offenses, where the Mayor was responsible for the village finances and a substantial

portion of village funds was derived from the mayor's court through fines, forfeitures, costs and fees. In rejecting the argument that any unfairness at the trial level could be corrected on appeal and a trial de novo in the county court, this Court wrote:

> This "procedural safeguard" does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

409 U.S. at 61-62.

If appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator, Concrete Pipe and Prod. of Cal. v. Construction Laborers Pension Trust for S. Cal. Inc., 113 S.Ct. 2264, 2277, 124 L.Ed.2d 539, 561 (1993) (citing Ward), can it be said that judi-

cial rulings which evidence the required degree of favoritism or antagonism to justify disqualification "properly can be reviewed upon appeal," United States v. Bertoli, 40 F.3d at 1413 (emphasis added). To ask the question is to answer it. The remedy by appeal is inadequate in a case where a trial judge wrongfully refuses to disqualify himself. See Berger v. United States, 244 U.S. at 36.

Even if judicial rulings, with or without accompanying opinion, rarely provide valid grounds for a § 455 motion, too much is at stake to allow holdings like those found in Huntington and Bertoli to stand. After all, a fair trial in a fair tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133, 136 (1955).

A judge is bound to decide each case fairly and in accordance with the relevant facts and the applicable law, even when the decision is not what "the home crowd

wants."[22] If particular judicial rulings provide evidence that a judge is unable to "hold the balance nice, clear, and true," Tumey v. Ohio, 273 U.S. 510, 532 (1927), they should be recognized as such by those charged with reviewing decisions against recusal, not brushed aside on grounds that those rulings are not relevant to § 455 or "properly can be reviewed on appeal."

b. The Court should revisit Liteky and establish a standard which District and Circuit Courts can use to gauge whether particular judicial rulings constitute valid grounds for a bias or partiality motion under § 455.

The Court in Liteky enunciated a single test for finding that a judicial ruling constitutes a valid ground for a bias or partiality motion: it must display deep-seated favoritism or antagonism that would

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[22] See Ruth Bader Ginsburg, Reflections on the Independence, Good Behavior and Workload of Federal Judges, 55 Colo. L. Rev. 1, 1-2 (1983); William H. Rehnquist, Act Well Your Part: Therein All Honor Lies, 7 Pepperdine L. Rev. 227, 229-30 (1980)).

render fair judgment impossible. 114 S.Ct. at 1158, 127 L.Ed.2d at 491-92. This test governs only those rulings which do not rely upon knowledge acquired outside the judicial proceedings at hand. Id. Where the judicial ruling shows reliance upon an extrajudicial source,[23] the test is that enunciated in § 455(a): whether there is an appearance of partiality. See Liteky, 114 S.Ct. at 1161, 127 L.Ed.2d at 496 (Kennedy, J., Blackman, J., Stevens, J., and Souter, J., concurring in judgment).

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[23] Although this Court has said judicial rulings "cannot possibly show reliance upon an extrajudicial source," Liteky, 114 S.Ct. at 1157, 127 L.Ed.2d at 490-91, the Seventh Circuit found the opposite to be true in Peacock Records, Inc. v. Checker Records, Inc., 430 F.2d 85, 89 (7th Cir. 1970), cert. denied, 401 U.S. 975 (1971), when it wrote:

> Findings by a trial judge unsupported by the record are evidence that the judge has relied on extrajudicial sources in making such determinations indicating personal bias and prejudice. Cf. United States v. Grinnell Corp., 384 U.S. 653, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

Of the Courts of Appeals which should have applied the "impossibility of fair judgment" standard to rulings alleged as grounds for recusal in two post-Liteky decisions, neither appeared to do so.

In Bertoli, the Third Circuit recited this standard on one page of its opinion, but applied the statutory standard on the next: "We do not believe that a reasonable person, looking at the [intrajudicial] rulings objectively, would conclude that the court was partial." 40 F.3d at 1413.

The Seventh Circuit in In re Huntington Commons Associates avoided this exercise altogether by holding, contrary to Liteky, that adverse rulings do not form the basis for a recusal motion. 21 F.3d at 158. Thus, it did not apply the "impossibility of fair judgment" test to rulings alleged to give rise to reasonable questions about the impartiality of the bankruptcy judge. 21 F.3d at 157-58.

Although its error may have been harmless, the Ninth Circuit applied the wrong standard in Chischilly before concluding that Judge Rosenblatt had not abused his discretion in refusing to recuse himself. 30 F.3d at 1149-50. The test it used was the "impossibility of fair judgment" standard. 30 F.3d at 1149. However, the judicial ruling Chischilly placed at issue in his § 455(a) motion was one which Judge Rosenblatt had made as a state judge on the question of Chischilly's competence to stand trial on unrelated sex charges. Id. Because the alleged partiality arose from an extrajudicial source, "an earlier judicial proceeding[] conducted by the same judge," Liteky, 114 S.Ct. at 1152, 127 L.Ed.2d at 484, the Third Circuit should have used the statutory standard instead.

Because the Courts of Appeals have not spoken with a single voice in their post-Liteky decisions, one that echoes express

and implied standards for judicial rulings in Liteky, and have misapplied or refused to apply those standards, Liteky should be revisited.

This mandamus proceeding provides a vehicle by which this can be done. First, it affords the Court an opportunity to clarify Liteky's standards for judicial rulings, both intra- and extrajudicial, or to adopt a single standard, one which can be properly applied by District Judges in the first instance or by Courts of Appeals on review of decisions against recusal.

Second, the facts in this case, unlike those in Liteky, afford the Court an opportunity "to describe the consequences of [the extrajudicial source] factor in complete detail," 114 S.Ct. at 1157, 127 L.Ed.2d at 490, if it elects to do so.

Facts that might reasonably cause an objective observer to question the impartiality of the successor judge or tend to

show bias or prejudice are embodied in a number of his rulings and circumstances surrounding their entry. Four of these judicial rulings are described below under headings taken from Liteky.

(1) **Judicial rulings alone which show requisite degree of favoritism or antagonism for disqualification.**

In Liteky, the Court said, "judicial rulings alone almost never constitute valid basis for a bias or partiality motion." 114 S.Ct. at 1157, 127 L.Ed.2d at 490 (citing Grinnell,[24] 384 U.S. at 583). One example of such a ruling is the order which summarily denied petitioners' pro se motion to vacate the order disqualifying Godlove. That same order directed the pro se petitioners to respond to the summary judgment motion which Hahn and the

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[24] Grinnell cited Berger which, in turn, cited Ex parte American Steel Barrel Co. for the proposition that the trial judge's alleged bias or prejudice "must be based upon something more than rulings in the case." 255 U.S. at 31.

Bamberger firm filed in the malpractice, fraud, and RICO action three weeks after Godlove was disqualified at their urging on grounds that she would have to testify as a witness at trial.

These facts "tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice," Ex parte American Steel Barrel Co., 230 U.S. at 44, that is, "a bent of mind that may prevent or impede impartiality of judgment," Berger, 255 U.S. at 33-34.

A second example is the order staying all discovery in the fraud on the court case until after the motion for summary judgment filed by the Bamberger firm in the second action was decided. It was entered by the successor district judge before petitioners had an opportunity to be heard. These facts clearly "show the objectionable inclination or disposition of the judge." Berger, 255 U.S. at 35.

(2) Rulings and accompanying opinions which satisfy Liteky standard for recusal

Facts presented in this case draw into question the soundness of generalizations found in the Court's opinion in Liteky, like those quoted below:

> In and of themselves (i.e., apart from surrounding comments or accompanying opinion), [judicial rulings] cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved.

114 S.Ct. at 1157, 127 L.Ed.2d at 490.

The first of many judicial rulings that evidence deep-seated favoritism or antagonism and show reliance on an extrajudicial source[25] is the order disqualifying Godlove in the malpractice, fraud and RICO action. Findings that the substance of a threatening telephone call from Ira Spanierman's lawyer is "in dispute" and that Godlove's testimony on the malpractice and RICO

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[25] See footnote 23, supra.

claims is "necessary" (which appear in an accompanying opinion) are not supported by any evidence in the record.

Another such ruling is the denial of Plaintiff's Motion for Imposition of Sanctions Under Rule 11 and 28 U.S.C. § 1927 for Filing Frivolous Motions to Disqualify Counsel and Stay Discovery. Two findings accompanied this ruling: (1) defendants' motions to disqualify counsel were well-founded, as evidenced by the order granting those motions, and (2) "plaintiff's request to stay discovery is extraneous, given that all discovery is already stayed." The latter finding reveals that denial of plaintiff's sanctions motion was based on the successor judge's reading its title, not the motion itself or arguments made in supporting or answer briefs.

The conduct of the successor judge in this instance is not unlike that of the district judge in Webbe v. McGhie Land

Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977), who announced that the defendant was "stuck" after he heard the argument of plaintiffs' counsel on their motion for summary judgment, but before he considered relevant evidence in the record or allowed defense counsel to make his argument. The Tenth Circuit, relying on § 455(a) and finding no reasonable likelihood that the judge could preside over the trial of that case in a fair and impartial manner, concluded that forced recusal and reassignment of the case to a different judge was required. 549 F.2d at 1361.

4. **The respondent judges should have recused themselves under § 455(a).**

The constitutional right to have "a neutral and detached judge" preside over judicial proceedings, Ward, 409 U.S. at 62, is not confined to trial courts, but extends to reviewing courts. See Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986). The same is true of obligations

imposed on the federal judiciary by the 1974 revision of § 455. See Liteky, 114 S.Ct. at 1153, 127 L.Ed.2d at 486.

a. **Judges Kanne and Easterbrook can be identified with two decisions alleged to be the "extrajudicial sources" of the unreasoning bias and prejudice that was exhibited by the successor district judge.**

Petitioners urged the Seventh Circuit to find that the judge's unreasoning prejudice[26] against their attorney[27] derived

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[26] There is a difference between a judge's unreasoning prejudice against a lawyer and well-founded impatience with a lawyer's obstructive tactics. Walberg v. Israel, 766 F.2d 1071, 1077 (7th Cir), cert. denied, 474 U.S. 1013 (1985).

[27] Petitioners also urged that court to follow United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993), and find that prejudice against Godlove could reasonably be imputed to petitioners under the circumstances summarized below:

> Were this not so, why would [the successor judge] force petitioners to proceed pro se on a summary judgment motion which purportedly raised only issues of law? Why would he strip petitioners of counsel when Godlove said she would not testify at trial, particularly where no defendant sustained his evidentiary burden on motions to disqualify her?

from "extrajudicial sources" -- the trial and appellate court opinions in Godlove[28] which Hahn and the Bamberger firm attached to their motion to disqualify counsel. Such a finding was a prerequisite to that court's concluding that the successor district judge should have disqualified himself. See Liteky, 114 S.Ct. at 1155, 127 L.Ed.2d at 488 ("extrajudicial source" is the only common basis for establishing disqualifying bias or prejudice under § 455(a) and § 455(b)(1)).

Because Circuit Judges Easterbrook and Kanne served on the panel that had, at one and the same time, affirmed and rendered the Godlove opinions, each had an interest in issues of fact he was called upon to decide in the mandamus proceeding. This interest was disqualifying under § 455(a).

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[28] These opinions reveal that Godlove made an ethical decision, right or wrong, and that four federal judges made a legal decision. Petitioners have paid for both.

Although the issue appears to be one of first impression for this Court, a similar question was before the court in City of Mobile v. Grayson, 220 Ala. 349, 125 So. 221 (1929). In Grayson, the Supreme Court of Alabama was asked to decide whether the judge should have recused himself on the ground of interest in a case where allegations were made that a power company, of which he was a customer, had collected money in excess of the legal rate. Finding recusal proper where no jury had been demanded, the court held:

> [A]n interest in the question of law presented does not disqualify a judge from sitting, or justify his recusation; but our decisions founded upon the stern morality of the common law, designed to preserve the confidence of the people in the courts as impartial tribunals in the administration of justice, disqualify a judge from sitting in a case where he is interested in the issues of fact which he is called upon to determine, though his conclusion may not affect, immediately, his personal interest.

125 So. at 222.

The holding in Grayson is consistent with principles enunciated by this Court in In re Murchison:

> [O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.

349 U.S. at 136.

One circumstance Circuit Judges Kanne and Easterbrook should have considered is the fact that they had been asked to find that remarks found in the Godlove opinions (though irrelevant to the issue of whether Godlove should be disqualified) revealed such deep-seated antagonism on their part and that of two other federal judges as to make fair judgment by a fifth (i.e., the successor district judge) impossible.

Also deserving of consideration under Murchison were certain relationships: the nexus between the Godlove opinions and the

mandamus action and the role each of those judges had played or was to play in prior and current proceedings. Cf. Russell v. Lane, 890 F.2d 947, 948 (7th Cir. 1989) ("it is considered improper --indeed is an express ground for recusal, see 28 U.S.C. § 47 -- in modern American law for a judge to sit on the appeal from his own case."); Rice v. McKenzie, 581 F.2d 1114, 1117 (4th Cir. 1978) (where an appeal is taken from Phillip to Phillip, there is a reasonable basis for questioning Phillip's impartiality on the appeal).

The fact that Judge Cudahy was not on the Godlove panel should not have ended his inquiry under § 455 or Murchison. Relationships and circumstances he should have evaluated include his sitting on a multimember panel with judges who were on that panel and the collegial decisionmaking process itself. Because petitioners were entitled to an impartial tribunal

whether it consists of one man or three and there is no way to gauge the influence Judges Easterbrook and Kanne had on him, Judge Cudahy's recusal was mandated. See Berkshire Employees Ass'n of Berkshire Knitting Mills v. National Labor Relations Bd., 121 F.2d 235, 239 (3d Cir. 1941); see also Aetna Life Ins. Co. v. Lavoie, 475 U.S. at 831 (Brennan, J., concurring).

b. **Respondents' impartiality was placed in issue when they did not take into consideration a Reply Brief petitioners filed before denying their Petition.**

In the Reply Brief they were allowed to file, petitioners addressed issues which defendants raised in their Response, among them waiver and timeliness arguments.

Though reference is made to their considering the Petition for Writ of Mandamus and defendants' Response, respondents say nothing in the Order denying the Petition which indicates that they read, much less considered, the Reply Brief (appendix at

2a). That fact, when gauged by Liteky's impossibility of fair judgment test or the statutory standard, should be sufficient to warrant respondents' forced recusal. Cf. Webbe v. McGhie Land Title Co., 549 F.2d at 1361. Their failure to allow the petitioners to be heard on what may have been dispositive issues "tend[s] to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice," Ex parte American Steel Barrel Co., 230 U.S. at 44, or partiality.

c. **When petitioners sought a rehearing, respondents had actual knowledge of the facts alleged to indicate their interest or bias.**

Circuit Judges Easterbrook and Kanne may have had a lapse of memory about serving on the panel that rendered one Godlove opinion and affirmed another, at the time petitioners' mandamus action was assigned to them. That, however, would not excuse their individual or collective failure to

recuse themselves on grounds of interest or bias. Section 455(a), as this Court has said, mandates recusal "even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." Liljeberg, 486 U.S. at 860-61.

Had they disqualified themselves before deciding the ultimate question presented by the mandamus petition, two different judges would have joined Judge Cudahy in determining whether the Godlove opinions constituted sources of what petitioners characterized as unreasoning prejudice on the part of the successor district judge.

When Circuit Judges Kanne and Easterbrook reviewed the petition for rehearing, after denying the mandamus petition, each obtained actual knowledge of his relationship to and involvement with two alleged "extrajudicial sources" of prejudice.

They and Judge Cudahy also knew of other facts alleged to be disqualifying under § 455(a), e.g., their failure to consider the Reply Brief or apply Liteky, as written.[29] Denial of the petition for rehearing signalled respondents' refusal to disqualify themselves so issues raised in the mandamus proceeding could be resubmitted to a panel of judges whose impartiality could not reasonably be questioned.

5. Vacatur of respondents' orders and those entered by the Chief Judge and his successor in the defendants' favor is proper.

Where a district judge has violated the duty imposed on him or her by § 455, the Court of Appeals must evaluate the significance of the violation and fashion the remedy that will best serve the purpose of the legislation. Liljeberg, 486 U.S. at

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[29] If a judge demonstrates that he is unwilling to carry out the law in a particular case, reassignment is appropriate. United States v. Torkington, 874 F.2d 1441, 1446 (11th Cir. 1989).

862. A fortiori, this Court should sit in judgment of § 455 violations occurring in the Courts of Appeals, evaluate their significance, and fashion proper remedies.

Assuming the Court chooses to exercise its supervisory powers, the final question presented for review in this proceeding is whether interlocutory rulings made by a judge whose recusal is mandated should be vacated if they favor parties favored by his bias, prejudice, or partiality.[30]

Such a remedy would promote public confidence in the courts and, thus, serve the purpose of § 455. It would also be in the interest of judicial economy. Not all prior rulings would have to be vacated. Nor would the successor judge be required to decide collateral issues, e.g. whether particular rulings show actual impropriety

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[30] Cf. Peacock Records, Inc. v. Checker Records, Inc. 430 F.2d 85, 89 (7th Cir. 1970) ("bias and prejudice renders invalid any resulting judgment in favor of the party so favored").

or prejudice. But cf. United States v. Murphy, 768 F.2d 1518, 1541 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986).

In the circumstances of this case, vacatur of respondents' Orders and rulings entered in defendants' favor by the Chief Judge and his successor is a proper remedy for their § 455 violations.

CONCLUSION

For the reasons set forth above, the petitioners submit that the Court should decide the questions presented for review and issue the writ sought.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

August 5, 1994

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

IN THE MATTER OF: THOMAS R. HUTCHINSON, Individually and as Personal Representative of the Estate of ROBERT W. HUTCHINSON, deceased, Petitioner.	Petitions for Writ of Mandamus Southern District of Indiana, Evansville Division.
No. 94-1174	No. 90 C 44 & 90 C 43
	Larry J. McKinney, Judge.
IN THE MATTER OF: THOMAS R. HUTCHINSON, Individually and as Personal Representative of the Estate of ROBERT W. HUTCHINSON, deceased, and ANNE E. HUTCHINSON, Individually, Petitioners.	
No. 94-1523	

Upon consideration of:

1. **"PETITION FOR WRIT OF MANDAMUS"** filed on January 25, 1994, by counsel for the petitioners.

2. **"RESPONSE OF BAMBERGER DEFENDANTS TO PETITION FOR WRIT OF MANDAMUS"** filed on February 11, 1994, by counsel.

3. **"PETITION FOR WRIT OF MANDAMUS"** filed on March 11, 1994, by counsel for the petitioners.

4. **"RESPONSE TO PETITION FOR WRIT OF MANDAMUS"** filed on March 29, 1994.

IT IS ORDERED that #1 and #3 are **DENIED.**

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

July 27, 1994

By the Court:

IN THE MATTER OF: THOMAS R. HUTCHINSON, Individually and as Personal Representative of the Estate of ROBERT W. HUTCHINSON, deceased and ANNE E. HUTCHINSON, Individually, Petitioners.	]	Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
Nos. 94-1174 and 94-1523	]	Nos. 90 C 43 and 90 C 44
	]	Larry J. McKinney, Judge

Upon consideration of:

1. **PETITIONERS' REQUEST FOR JUDICIAL NOTICE** filed 3/11/94, by counsel.

2. **PETITIONERS' REPLY BRIEF** received 4/11/94, by counsel.

IT IS ORDERED that #1 is **GRANTED** pursuant to the court's 7/22/94 order that consolidated these mandamus petitions for disposition.

IT IS FURTHER ORDERED that #2 is **GRANTED** and the clerk of this court will accept the tendered reply for filing instanter.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

October 14, 1994

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

IN THE MATTER OF: THOMAS R. HUTCHINSON, Individually and as Personal Representative of the Estate of ROBERT W. HUTCHINSON, deceased and ANNE E. HUTCHINSON, Individually, Petitioners.	] Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.] Nos. 90 C 41 and 90 C 44
Nos. 94-1174 and 94-1523	] Larry J. McKinney, Judge

Upon consideration of the **"PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC"** filed 8/19/94, by counsel for the petitioners,

IT IS **ORDERED** that the Petition for Rehearing is **DENIED.**

FILED

No. 94-2129

FEB 22 1995

OFFICE OF THE CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

In re Thomas R. Hutchinson, individually and as the Personal Representative of the Estate of Robert W. Hutchinson, deceased, and Anne E. Hutchinson, individually,

Petitioners.

SEPARATE APPENDIX TO PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, deceased,	)	
Plaintiff,	)	
vs.	)	CAUSE NO. EV 90-43-C
GORDON THOMPSON, MARGARET ANN THOMPSON LYNCH, IRA SPANIERMAN, and IRA SPANIERMAN, INC.,	)	
Defendants.	)	

THOMAS R. HUTCHINSON, et al.,	)	
Plaintiffs,	)	
vs.	)	CAUSE NO. EV 90-44-C
IRA SPANIERMAN, et al.,	)	
Defendants.	)	

ORDER ON MOTION FOR RECUSAL OF PRESIDING JUDGE

This cause is before the Court on the motion, filed dually by the plaintiffs in the companion cases of Hutchinson v. Thompson, No. EV 90-43-C, and Hutchinson

v. Spanierman, No. EV 90-44-C, for an order disqualifying the undersigned judge from presiding further in either case. For the reasons stated, the motion is DENIED.

I.

Under 28 U.S.C. § 455, the "comprehensive federal recusal statute," United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986), a federal judge is to disqualify himself when he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts (§ 455(b)(1)), or when his impartiality might reasonably be questioned by "an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal [is] sought" (§ 455(a)). Balistrieri, 779 F.2d at 1202-05; Spangler v. Sears, Roebuck & Co., 759 F.Supp. 1327, 1328 (S.D. Ind. 1991) (Tin-

der, J.) (quoting Pepsico, Inc. v. McMillen, 764 F.2d 458, 460 (7th Cir. 1985)).

Plaintiffs invoke both § 455(b)(1) and § 455(a), but admit that they "lack actual knowledge" that the undersigned is actually biased. See Plaintiffs' Supporting Brief at 5. This would appear to make § 455(a), which has a broader scope than § 455(b)(1), see United States v. Professional Air Traffic Controllers Organization ("PATCO"), 527 F.Supp. 1344, 1359 (N.D. Ill. 1981), the subsection most applicable to plaintiffs' motion. See Balistrieri, 779 F.2d at 1204 (§ 455(a) "is directed against the appearance of partiality, whether or not the judge is actually biased").[1] Thus, though as a

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[1] This is particularly true given plaintiffs' failure to cite any true "extrajudicial source" -- i.e., a source beyond the present judicial proceedings themselves -- for any alleged actual bias or prejudice under § 455(b)(1). See Spangler, 759 F.Supp. at 1331-32 (recusal under § 455(b)(1) must be based on extrajudicial source). Plaintiffs

practical matter the standards for recusal under both subsections appear to be the same -- i.e., whether a reasonable person would be convinced that the judge is biased, Balistrieri, 779 F.2d at 1202; Spangler, 759 F.Supp. at 1328; PATCO, 527 F.Supp. at 1359 -- plaintiffs' motion has been analyzed under § 455(a) only.[2]

---

have stated that the trial court and appellate opinions in Godlove v. Bamberger, Foreman, Oswald & Hahn, No. EV 85-192-C, are "extrajudicial sources" for this Court's alleged bias and prejudice. However, plaintiffs have cited no case holding that judicial opinions of public record in a case other than the one in which charges of bias are brought can constitute "extrajudicial sources" of bias -- particularly where the opinions have been made a part of the record in the case in which charges are made, as here. See Affidavit of Robert Hahn (Oct. 9, 1990), Ex. 1-B (attaching Seventh Circuit opinion in Godlove v. Bamberger, Foreman, Oswald & Hahn, No. 89-2722 (June 6, 1990) (published at 903 F.2d 1145)).

[2] Plaintiffs' failure to effectively allege actual basis [sic] on the part of the Court does dispense with the Court's duty to recuse if it does in fact harbor actual bias or prejudice concerning a party. The Seventh Circuit has made clear that § 455(b)(1) is

Plaintiffs accusations of bias are serious, and the Court has considered them carefully in light of the record of both EV 90-43-C and EV 90-44-C -- particularly those items illuminated by the plaintiffs' briefing. Upon review, the Court concludes that no reasonable observer, armed with all the facts, would "entertain a significant doubt that justice [will] be done," Spangler, 759 F.Supp. at 1328 (quoting Pepsico, 764 F.2d at 460), and therefore finds that recusal is not warranted.

II.

Plaintiffs contend generally that this Court has shown hostility and bias toward

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"self-executing," and is to be enforced on the judge's own motion when necessary. Balistrieri, 779 F.2d at 1202. However, the Court states for the record (as self-serving as such must sound) that it neither harbors any actual bias or prejudice concerning any party in this case, nor has any personal knowledge of disputed facts which would justify recusal under § 455(b)(1).

them in these cases, that it has treated them unfairly, and that it therefore has deprived them of a fair tribunal and due process. See Plaintiffs' Supporting Brief at 5. This general accusation is followed by several enumerated acts and/or failures to act by the Court which plaintiffs claim would lead a reasonable person to believe that the Court is biased or prejudiced.

A.

Plaintiffs initially argue that evidence of the Court's bias "against plaintiffs' counsel of choice" is found in the Court's "[First] Order on Motion to Disqualify," No. EV 90-43 (Feb. 25, 1992). Plaintiffs challenge four specific statements, each of which requires examination.

(1) **"The Court realizes that Godlove . . . [has] been disqualified in EV 90-44-C."** Plaintiffs contend that this statement reflects Court bias toward plain-

tiffs' choice of counsel, because Godlove was not disqualified from representing plaintiffs' in EV 90-44-C until April 6, 1992. See [Second] Order on Motion to Disqualify, No. EV 90-44 (April 6, 1992).[3] The Court admits to having misread the record in EV 90-44-C when it issued the disqualification order in EV 90-43-C. However, judicial errors in reading the record do not create the appearance of judicial bias or prejudice. See Spangler, 759 F.Supp. at 1333 (logical or factual errors do not create appearance of partiality).

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[3] The Court notes that plaintiffs have not denied that Godlove continues to contribute to papers signed and filed by Todd Alexander in EV 90-44-C. See Reply to Bamberger Defendants' Response to Plaintiffs' Notice of David T. Kasper's Deliberate Violation of Rule 3.3(a)(3) of the Rules of Professional Conduct By Refusing to Disclose Controlling Authority to Court, No. EV 90-44-C (filed Feb. 3, 1993). In addition, the present motion to disqualify, which is signed by Godlove, was filed simultaneously in both EV 90-43-C and EV 90-44-C.

(2) **"There will be some overlap in the discovery which is conducted in the two cases. The Court cannot stress strongly enough that Godlove . . . [is] to conduct no discovery [in EV 90-43-C] which is to be utilized in EV 90-44-C."** Plaintiffs argue that the "net effect" of this statement was to force Russell Carson, "an attorney who had minimal knowledge of these cases," to conduct a large portion of the discovery in EV 90-43-C, and that this restriction prejudiced the plaintiffs. At its heart, however, this argument merely vents plaintiffs' unhappiness with the Court's order disqualifying Godlove in EV 90-44-C -- a ruling for which appeal, not a motion for recusal, is the appropriate response. McCann v. Communications Design Corp., 775 F.Supp. 1506, 1526 (D. Conn. 1991). Plaintiffs also state that they can find no "reported decision which even arguably provides

support" for this Court's decision to prohibit Godlove from conducting discovery in EV 90-43-C if the results would be utilized in EV 90-44-C. However, plaintiffs cite no case which specifically says such a limitation is beyond the Court's inherent power to control discovery in both cases. See Petrus v. Bowen, 833 F.2d 581, 583 (5th Cir. 1987); Hachette Dist., Inc. v. Hudson County News Co., Inc., 136 F.R.D. 356, 358 (E.D.N.Y. 1991).

(3) "The Court also puts plaintiff's counsel on notice that if it comes to their attention that [Godlove or the three other attorneys in her firm at the time] are likely to be called as a witness in this cause of action [EV 90-43-C], plaintiff's counsel must withdraw from the case immediately." Plaintiffs contend that this statement "stands applicable law on its head," but their argument raises no concerns of apparent partiality by the

Court. Initially, the contention amounts to nothing more than a reargument on the merits of the Court's decision to disqualify Godlove in EV 90-44-C -- a decision that if erroneous will be corrected by the Seventh Circuit if and when plaintiffs prosecute an appeal. See Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981); Spangler, 759 F.Supp. at 1333. Further, even if the statement does evidence a misunderstanding of the law, such does not create an appearance of bias on the Court's part. Panzardi-Alvarez v. United States, 879 F.2d 975, 984 n.7 (1st Cir. 1989) (mistakes of law are not evidence of bias), cert. denied, 493 U.S. 1082 (1990); Cipollone v. Liggett Group, Inc., 822 F.2d 335, 347 (3d Cir. 1987) (same), cert. denied, 484 U.S. 976 (1987).

(4) "Counsel for plaintiff is requested to consider carefully whether

attorney Godlove will be called as a witness -- either during the plaintiff's case in chief, in rebuttal, or reasonably by the defendants in their case in chief." Plaintiffs contend that the Court, in making this request, ignored evidence in the record in EV 90-43-C -- particularly, the affidavit of Joan Godlove -- which indicates that she will not be called as a witness. The Court did not ignore Godlove's affidavit, however; its admonition to "consider carefully" whether Godlove would be called to testify was simply a reiteration of its concerns about the matter, and nothing more.

B.

Plaintiffs next contend that this Court's "pervasive prejudice against plaintiff and his counsel of choice" was demonstrated by this Court's decision to disqualify Godlove in EV 90-44-C because none of the movants for disqualification

actually sustained the burden of proof "insofar as plaintiff's legal malpractice, constructive fraud and fraud claims . . . were concerned." This argument simply revisits the validity of the Court's order to disqualify Godlove, and presents no ground upon which "a reasonable person, knowing and understanding all the relevant facts, would conclude that the judge's impartiality might be questioned." McCann, 775 F.Supp. at 1523. Appeal -- not a § 455 motion -- is the proper way to voice disagreement with the Court's rulings. Spangler, 759 F.Supp. at 1333.

C.

Plaintiffs next contend that bias and prejudice are "suggested by the Court's blind acceptance of void orders staying discovery or quashing deposition subpoenas entered by Chief Judge Brooks and Magistrate Judge Hussman" in EV 90-44 on May 1, May 7, May 9, and October 31, 1991 (the

"1991 discovery orders"). Plaintiffs claim that the Court, by treating the 1991 discovery orders as being valid when they were not, see Order on Various Motions (Jan. 28, 1993) (the "January Order") "took sides [and] assumed the mantle of . . . advocate" for the defendants.

Plaintiffs' arguments do not raise any concerns of apparent judicial bias or prejudice. Beyond simply attacking the validity of the Court's rulings (which, as already stated, is not a proper ground for recusal), plaintiffs' claims malign the Court for issuing an order without considering arguments that plaintiffs themselves had not yet even raised.[4]

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[4] Plaintiffs' arguments have not gone unnoticed, however, as is evidenced by separate orders issued today in both EV 90-43-C and EV 90-44-C. See Order on Request for Judicial Notice Re: Jurisdiction, No. EV 90-44-C (Aug. 17, 1993); Order Lifting Stay on Discovery, No. EV 90-43-C (Aug. 17, 1993); Order Staying Proceedings, No. EV 90-44-C (Aug. 17, 1993).

D.

Next, plaintiffs contend that this Court has demonstrated bias in favor of the defendants by acting in a manner that appears designed to protect Chief Judge Brooks "from possible embarrassment," and to shield "those charged with perpetrating the fraud" alleged in EV 90-43-C from sanction. Plaintiffs point to two items of evidence of such "protection" by the Court: (1) the Court's "unjustified refusal" to allow discovery in EV 90-43-C; and (2) its "unexplained reluctance" to initiate an independent investigation into that alleged fraud.

Neither item creates any appearance of bias or prejudice by this Court. Initially, the Court notes that its decision to stay discovery in EV 90-43-C was not "unjustified." As discussed in more detail in a separate order issued today, see Order Lifting Stay on Discovery, No. EV

90-43-C (Aug. 17, 1993), discovery was first stayed to give the Court time to decide whether to disqualify Joan Godlove from acting as plaintiffs' attorney, see Scheduling Order, No. EV 90-43-C (Jan. 21, 1992), and the stay was kept in force to allow resolution of the Bamberger defendants' motion for summary judgment in EV 90-44-C See Order, No. EV 90-43-C (Oct. 6, 1992). Moreover, no case of which the Court is aware imposes any duty upon a court to "investigate" fraud upon the court whenever such is alleged. Certainly, the Court has the "inherent power" to launch an investigation if it desires, see Universal Oil Prods. Co. v. Root Refining Co., 328 U.S. 575, 580-81 (1946), but nothing requires it to do so.

E.

Next, plaintiffs contend that the Court's "ruling on plaintiff's sanctions motions suggests that its mind is 'irrevo-

cably closed.'" Plaintiffs base this allegation on language in the Court's order of April 5, 1993 in EV 90-44-C, which stated:

> "Plaintiff's Motion for Imposition of Sanctions Under Rule 11 and 28 U.S.C. § 1927 for Filing Frivolous Motions to Disqualify Counsel and Stay Discovery," filed November 18, 1991, and "Plaintiffs' Motion for Imposition of Sanctions Under Rule 11 and 28 U.S.C. § 1927 for Filing of Berger Defendants' Baseless Motion to Disqualify Counsel," filed February 26, 1993, are both DENIED in all respects. The motions to disqualify counsel were well-founded -- as evidenced by their granting by this Court -- and were in no way "frivolous" or "baseless." Moreover, plaintiff's request to stay discovery is extraneous, given that all discovery is already stayed.

Order (April 5, 1993), at 2-3. Plaintiffs argue that the underlined sentence shows bias by the Court, because plaintiffs' motion did not seek a stay of discovery. Plaintiffs therefore conclude that the Court "based its ruling on the title of that motion, not what is set forth in the body of the motion or arguments made in

plaintiffs' opening and reply briefs," and that this reflects that the Court's mind is "irrevocably closed" against them, at least on the issue of sanctions.

The challenged language does seem to assume that plaintiffs had requested a stay of discovery. That language, however, appeared in the April 5 order due [to] a drafting error that inadvertently deleted a critical phrase. In actuality, the challenged sentence should have read: "Moreover, plaintiff's request <u>for sanctions with regard to the defendants' motion</u> to stay discovery is extraneous, given that discovery is already stayed." This error has been corrected by separate order today. <u>See</u> Order Correcting Drafting Errors, No. EV 90-44-C (Aug. 17, 1993). As a result, no fully informed disinterested observer would conclude, as plaintiffs apparently have, that the Court has an "overwhelming bias in favor of defendants and

their attorneys and an 'irrevocably closed mind' on the subject of sanctions."[5] See Plaintiffs' Supporting Brief at 32.

F.

Finally, the plaintiffs contend that the Court "[has] not treat[ed] Tom Hutchinson and Ira Spanierman equally in EV 90-43-C," because (1) it has failed to enter a default or default judgment on two separate occasions, and (2) it has required Hutchinson to "respond to Spanierman's Rule 12(b) motions [in EV 90-43-C], [while] indefinitely extend[ing] the time for [Spanierman] to respond to a Rule 56(a) motion plaintiff initially filed on March 13, 1991."

Plaintiffs' first contention raises no concerns of apparent judicial bias or prejudice. The Court's "failures" to enter

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[5] The Court further notes that plaintiffs have not cited one case in which a party was sanctioned for filing a successful motion.

default or a default judgment against the Spanierman defendants have been based on the law and have been thoroughly explained. See Order, No. EV 90-43-C (Nov. 2, 1992); Order on Motion to Reconsider Rulings on Plaintiff's Motions for Entry of Default and Entry of Default Judgment, No. EV 90-43-C (Jan. 28, 1993); Order on Motions for Default Against Spanierman Defendants, No. EV 90-43-C (Aug. 17, 1993). Plaintiffs are free to disagree with the Court's default rulings, but they may voice that disagreement only through appealing, and not by filing a § 455 motion.

Plaintiffs' second contention similarly fails to raise any concerns of apparent bias on the part of this Court. The issues (and corresponding complexity) in Spanierman's Rule 12(b) motion were different from those raised in Hutchinson's Rule 56(a) motion, and the Court thought it best to require a prompt response to

the first while deferring consideration of the second.[6] Further, the delay granted to Spanierman had a logical, neutral basis, because it was premised in large part on the Court's belief -- now abandoned, see Order Lifting Stay on Discovery, No. EV 90-43-C (Aug. 17, 1993) -- that it should address the Bamberger defendants' motion for summary judgment in EV 90-44-C before proceeding with EV 90-43-C.

III.

For the reasons discussed, plaintiffs' motion for recusal of the undersigned judge pursuant to 28 U.S.C. § 455 is DENIED. Plaintiffs have stated their intent to challenge any denial of their motion for disqualification by seeking a writ of mandamus from the Seventh Circuit

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[6] The Court notes that the plaintiffs actually prevailed with respect to Spanierman's motion, which was denied. See Order on Motions to Dismiss, EV 90-43-C (Jan. 28, 1993).

Court of Appeals, as is their prerogative. See United States v. Sidener, 876 F.2d 1334, 1336 (7th Cir. 1989). Therefore, in light of the Seventh Circuit's comment that it is prudent to "vacate[] all decisions taken after the filing of a justified motion to disqualify a judge under § 455(a)," New York City Dev. Corp. v. Hart, 796 F.2d 976, 979 (7th Cir. 1986) (per curiam), the Court temporarily STAYS all further proceedings in EV 90-43-C, with the specific exception of those matters dealt with today by other orders of the Court (which stem from motions filed before plaintiffs' motion to disqualify).[7] This temporary stay shall remain in effect until (1) either plaintiffs notify the Court on the record that no writ of manda-

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[7] The Court points out that proceedings in EV 90-44-C already have been stayed by separate order today. See Order Staying Proceedings, No. EV 90-44-C (Aug. 17, 1993).

mus will be sought, or the Seventh Circuit issues a decision on plaintiffs' writ of mandamus application, and (2) the Court thereafter issues a scheduling order.[8]

SO ORDERED this 17 day of August, 1993.

/s/
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

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[8] The scheduling order will set a new time limit for the Spanierman defendants' response to "Plaintiff's Motion for Partial Summary Judgement Against Ira Spanierman and Ira Spanierman, Inc.," filed November 30, 1992. The scheduling order also will set a new time limit for plaintiff to respond to the "Motion to Dismiss Second Amended Complaint" filed by defendants Gordon Terhune Thompson and Margaret Ann Thompson Lynch on May 20, 1993. This fact, coupled with the fact that the stay on discovery in EV 90-43-C has been lifted subject to the temporary stay on all proceedings discussed supra, see Order Lifting Stay on Discovery, No. EV 90-43-C (Aug. 17, 1993), effectively resolves "Plaintiff's Motion for Extension of Time to File and Serve Brief in Answer to Motion to Dismiss of Gordon Terhune Thompson and Margaret Ann Thompson Lynch and an Order Allowing Plaintiff to Conduct Discovery [RE:] In Personam Jurisdiction," filed June 7, 1993. To the extent that said motion is not resolved, it is DENIED as moot.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

THOMAS R. HUTCHINSON, as personal representative of the estate of Robert W. Hutchinson, deceased,	)	
Plaintiff,	)	
vs.	)	CAUSE NO. EV 90-43-C
IRA SPANIERMAN, individually and as an agent of Ira Spanierman, Inc., Spanierman Gallery and Kennedy Galleries, Inc., et al	)	
Defendants.	)	

ORDER ON MOTION TO DISQUALIFY

This matter is before the Court on defendants Ira Spanierman and Ira Spanierman, Inc.'s Motion to Disqualify Counsel filed March 1, 1991. That motion adopted by reference the arguments found in two briefs filed in a "companion case," Thomas R. Hutchinson, Individually and as Personal Representative of the Estate of Robert W. Hutchinson, deceased v. Ira Spanierman,

et al., EV 90-44-C. The plaintiff filed a Brief in answer to the Motion to Disqualify and the Affidavit of Joan Godlove concerning matters related to the Motion to Disqualify Counsel on September 27, 1991. The Court notes that plaintiff has filed various other documents which relate to the Motion to Disqualify Counsel (i.e. Motion to Strike). The Court has reviewed these pleadings, and considered the content of those pleadings in arriving at its conclusion in this matter.

After having considered the foregoing, the Court hereby **DENIES** the Motion to Disqualify Counsel.

IT IS SO ORDERED this 25 day of February, 1992, at Evansville, Indiana.

/s/
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

MEMORANDUM

This matter is before the Court on defendants Ira Spanierman and Ira Spanierman, Inc.'s Motion to Disqualify Counsel filed March 1, 1991. That motion adopted by reference the arguments found in two briefs filed in a "companion case," Thomas R. Hutchinson, Individually and as Personal Representative of the Estate of Robert W. Hutchinson, deceased v. Ira Spanierman, et al., EV 90-44-C. The plaintiff filed a Brief in answer to the Motion to Disqualify and the Affidavit of Joan Godlove concerning matters related to the Motion to Disqualify Counsel on September 27, 1991. The Court notes that plaintiff has filed various other documents which relate to the Motion to Disqualify Counsel (i.e. Motion to Strike). The Court has reviewed these pleadings, and considered the content of those pleadings in arriving at its conclusion in this matter.

DISCUSSION

The issue raised by defendants Spanierman and Spanierman, Inc. (hereafter Spanierman) is whether plaintiff's counsel, Joan Godlove, must be disqualified in this case since "the issues and evidence presented to the Court in the instant case are almost identical to those to be presented to the Court in [EV 90-44-C]. It has been alleged that Godlove is likely to be called as a witness in EV 90-44-C. The parties agree that Indiana Rules of Professional Conduct, Rule 3.7[1], gives guidance to the Court on the resolution of this case. Rule 3.7 provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> > (1) the testimony relates to an uncontested issue;

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[1] This Court by Local Rule IV of the Disciplinary Enforcement Rules of the Southern District of Indiana has specifically incorporated the current Indiana Rules of Professional Conduct.

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9

The comments to Rule 3.7 provides the following insight:

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on the evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical . . .

> paragraph (a)(3) recognizes that a balancing act is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

The Rules of Professional Responsibility became effective in Indiana on January 1, 1987. Thus, there is not an overabundance of case law applying these rules. As a result, several courts have chosen to review cases involving the new rules, and the predecessor Code of Professional Responsibility.

DISQUALIFICATION

A recent case which discussed the relationship between Rule of Professional

Conduct 3.7 and its predecessor under the Code of Professional Responsibility, DR 5-101 and DR 5-102 is Cannon Airways, Inc. v. Franklin Holdings Corp., 669 F.Supp. 96 (D.C. Del. 1987). The Cannon Court concluded that Rule of Professional Conduct 3.7 "requires the [moving] party to bear a higher burden on the disqualification motion, permits the Court to delay ruling until it can determine whether another witness can testify, and precludes a lawyer's disqualification if the lawyer's testimony would be merely cumulative." Id., at 100. The distinction between the two rules comes from the language utilized The predecessor rule required disqualification if the lawyer ought to be called as a witness while the new rule requires disqualification if the lawyer is "likely to be a necessary witness."

In this circuit, motions to disqualify counsel are considered "drastic measures."

Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982). In other circuits, the Courts have concluded that the party seeking disqualification must carry a "heavy burden" and meet a "high standard of proof" before a lawyer is to be disqualified. Paretti v. Cavalier Label Co., 722 F.Supp. 985 (S.D.N.Y. 1989). The party seeking disqualification must produce evidence that is more than "mere allegations" of impropriety. Optyl Eyewear Fashion International Corp. v. Style Cos., 760 F.2d 1045 (9th Cir. 1985). The Courts may not disqualify an attorney who may be a witness based upon factual assertions that are "largely speculative." Pain Prevention Lab, Inc. v. Electronic Waveform Labs, Inc., 657 F.Supp. 1486 (N.D. Ill. 1987). However, it must be realized that the district court does not have the benefit of hindsight, and must make a decision on the basis of the record

before the Court during the initial stages of litigation.

A review of several cases cited by the parties in this case shows that the order of disqualification must be based upon a substantial recitation of facts concerning the attorney's underlying participation in the matter about which he/she will testify. This recitation is done either by affidavit or by hearing evidence. See, Cannon, 669 F.Supp. at 100-01; Pain Prevention Lab, 657 F.Supp. at 1495. See also U.S. v. Castellano, 610 F.Supp. 1137 (S.D.N.Y. 1985) (noting that this is in the context of a criminal case). Several courts have indicated that the issue is best resolved after discovery has been completed. Cannon, supra; Paretti, supra.

A recent Seventh Circuit case analyzed the propriety of disqualification pursuant to the strictures of 3.7(a). In United States v. Defazio, 899 F.2d 626 (7th Cir.

1990) the defendant was charged with bankruptcy fraud. The attorney representing the defendant had asssisted with the preparation of the bankruptcy schedules. Thus, the government sought disqualification of the attorney. The district court disqualified the attorney finding that he might be called as a witness. After noting that "the justice system has an interest in not having a defense attorney be both advocate and witness regarding material issues," the Seventh Circuit affirmed, finding:

> At the time Judge Kocoras disqualified [the attorney] how likely was it that [the defendant] would raise an advice of counsel defense? Of course, as it turned out, [the defendant] did not raise the defense at trial, and [the attorney] did not testify. But this is unimportant, since we do not review the district court's decision with the advantage of hindsight. See Wheat, 486 U.S. at 162-63, 108 S.Ct. at 1698-99. The defendant did have [the attorney] under subpoena during trial, though, which helps corroborate the trial judge's conclusion that his becoming a defense witness was a strong possibility.

> There is no question that [the defendant] might has asserted at least a partial defense based upon the content of [defendant's] Chapter 7 guidance.

Id. at 630 (emphasis in original). Thus, although Rule 3.7 requires the movant to carry a heavier burden than did the predecessor, the movant need not establish with complete certainty that the attorney will testify. The burden which the movant carries lies somewhere between speculation and complete certainty.

The facts on the record before this Court (some of which is found in EV 90-44-C) consist of the Affidavit of Robert Hahn, answers to interrogatories from certain of the defenants, and the Affidavit of Joan Godlove. For the reasons set forth below, the factual evidence tendered does not in this Court's opinion establish, by a high standard of proof, that Godlove must be disqualified in this cause of action.

The plaintiff's Amended Complaint alleges that the judgment in EV 80-104-C was obtained through the use of unfair influence. The plaintiff contends that Robert Hahn (not a defendant in this cause of action) made false representations to the plaintiff during the time in which Hahn was handling the litigation. (Amended Complaint, p. 3). The Amended Complaint further alleges that Hahn breached his fiduciary duty to the plaintiff by concealing information from the plaintiff, including the fact that Godlove was discharged. (Amended Complaint, p. 4). The plaintiff also argues that Hahn colluded with and was induced by Charles Berger (not a defendant in this cause of action) to breach his fiduciary duty to the plaintiff. (Amended Complaint, p. 5).

The defendants assert that Godlove will have to testify based on the arguments presented in EV 90-44-C. Godlove filed an

affidavit setting forth an outline of the argument the plaintiff plans to present at trial. This outline does not establish the necessity of Godlove's testimony. The defendants failed to provide an adequate factual basis showing that Godlove, Roberts, Marrs or Carson is likely to be called as a witness. The Court has taken into consideration the relationship of the two cases and the fact that discovery between the two may well overlap. However, the two cases will be tried separately, and each case must stand on its own. Until the defendant can establish with reasonable certainty that Godlove is likely to be called as a witness, Godlove may remain in this case. Thus, the defendants have failed to meet the burden of proof which is required before the Court will order the disqualification of the attorney which the plaintiff has chosen. The Court realizes that Godlove, Roberts,

and Marrs have been disqualified in EV 90-44-C. There will be some overlap in the discovery which is conducted in the two cases. The Court cannot stress strongly enough that Godlove, Roberts and Marrs are to conduct no discovery which is to be utilized in EV 90-44-C. Any attempt to do so should be brought to the immediate attention of the Court. The Court also puts plaintiff's counsel on notice that if it comes to their attention that any of the four are likely to be called as a witness in this cause of action, plaintiff's counsel must withdraw from the case immediately. Plaintiff's counsel may not remain in the case until a late date and attempt to continue as counsel based on a claim of hardship, since it is now reasonably foreseeable that they may be called to testify. Jackson v. Russell, 498 N.E.2d 28 (Ind. Ct. App. 1986).

CONCLUSION

Because the defendants have failed to carry their burden with respect to the Motion to Disqualify Counsel, the motion must be **DENIED** at this time. Counsel for plaintiff is requested to consider carefully whether attorney Godlove will be called as a witness -- either during the plaintiff's case in chief, in rebuttal, or reasonably by the defendants in their case in chief. A later motion to disqualify based upon a more developed factual record will at least add expense and delay to this litigation, and may have even more severe consequences to the plaintiff's claim if the motion must be granted at or very near the trial date.

DATED: February 25, 1992.

/s/
LARRY J. McKINNEY, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

THOMAS R. HUTCHINSON, Individually and as Personal Representative of the Estate of Robert W. Hutchinson, deceased,	)	
Plaintiff,	)	
vs.	)	CAUSE NO. EV 90-44-C
IRA SPANIERMAN; IRA SPANIERMAN,INC.; SPANIERMAN GALLERY; BAMBERGER, FOREMAN OSWALD AND HAHN; ROBERT H. HAHN, Individually and as Member of Bamberger, Foreman, Oswald & Hahn; BERGER & BERGER; CHARLES L. BERGER, individually and as Member of Berger & Berger and as Agent for Ira Ira Spanierman, Inc., Ira Spanierman and Spanierman Gallery; WILLIAM E. JAGEMAN, Individually and as Shareholder of Jageman and McGraw; JAGEMAN AND McGRAW, INC., RITA DEERE, Individually and as Agent of Bamberger, Foreman, Oswald & Hahn; VIOLA M. DAY, Personal Representative of the Estate of Margaret L. Thompson, deceased; KENNEDY GALLERIES, INC.; BARRY J. BOXER; ROSE & BOXER; and JOHN AND JANE DOES 1 - 20,	)	
Defendants.	)	

ORDER ON MOTION TO DISQUALIFY

This matter is before the Court on the motion of defendants Bamberger, Foreman, Oswald and Hahn, Robert H. Hahn and Rita Deere for disqualification of plaintiff's counsel filed October 9, 1990.[1] Plaintiff filed his "Notice of Factual and Legal Insufficiency of Disqualification-Related Motions and Papers Filed by the Bamberger, Jageman and Spanierman Defendants" and Appendix thereto, an Affidavit of Joan Godlove, and "Plaintiff's Request that Defendants Withdraw Disqualification Motions" on September 24, 1991. Plaintiff further filed a "Brief in Answer to Defendant's Motion to Disqualify Counsel" on September 30, 1991. Defendants filed a response to plaintiff's notice on October 10, 1991. For the reasons set forth below, the Court finds that attorneys Joan

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[1] Other defendants have joined in the motion to disqualify, and this Order relates to all such motions.

Godlove, C. Clay Roberts, and Richard D. Marrs must be disqualified, but that attorney Russell D. Carson may continue to represent the plaintiff in this cause of action.

I. INTRODUCTION

The issue raised by defendants Bamberger, Foreman, Oswald and Hahn, Robert H. Hahn and Rita Deere (hereafter the "Bamberger Defendants") is whether plaintiff's counsel, Joan Godlove, must be disqualified in this case because she may testify as a witness. The parties agree that Rule 3.7 of the Indiana Rules of Professional Conduct, Rule 3.7[2], gives guidance to the Court on the resolution of this case. Rule 3.7 provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness

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[2] This Court by Local Rule IV of the Disciplinary Enforcement Rules of the Southern District of Indiana has specifically incorporated the current Indiana Rules of Professional Conduct.

except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9

The comments to Rule 3.7 provides the following insight:

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on the evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

> Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical . . .
>
> Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing act is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

The Rules of Professional Responsibility became effective in Indiana on January 1, 1987; thus, there is not an overabundance of case law applying these rules. As a result, several courts have chosen to review cases involving the new rules using the predecessor Code of Professional Responsibility as a backdrop.

II. DISQUALIFICATION -- GENERAL STANDARDS

The relationship between Rule 3.7 and its predecessors under the Code of Professional Responsibility, DR 5-101 and DR 5-102, was discussed recently in Cannon Airways, Inc. v. Franklin Holdings Corp., 669 F.Supp. 96 (D.C. Del. 1987) (Delaware version). The Cannon Court concluded that Rule 3.7 "requires the [moving] party to bear a higher burden on the disqualification motion, permits the Court to delay ruling until it can determine whether another witness can testify, and precludes a lawyer's disqualification if the lawyer's testimony would be merely cumulative." Id. at 100. The distinction between the new and old standards comes from the language utilized. The predecessor rule required disqualification if the lawyer ought to be called as a witness, while the new rule requires disqualification if the lawyer is "likely to be a necessary witness."

In this circuit, motions to disqualify counsel are considered "drastic measures." Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982). In other circuits, the Courts have concluded that the party seeking disqualification must carry a "heavy burden" and meet a "high standard of proof" before a lawyer is to be disqualified. Paretti v. Cavalier Label Co., 722 F.Supp. 985 (S.D.N.Y. 1989). The party seeking disqualification must produce evidence that is more than "mere allegations" of impropriety. Optyl Eyewear Fashion Int'l Corp. v. Style Cos., 760 F.2d 1045 (9th Cir. 1985). A court may not disqualify an attorney who may be a witness based upon factual assertions that are "largely speculative." Pain Prevention Lab, Inc. v. Electronic Waveform Labs, Inc., 657 F.Supp. 1486 (N.D. Ill. 1987). However, it must be realized that the district court does not have the bene-

fit of hindsight, and must make a decision on the basis of the record before it during the initial stages of litigation.

A review of several cases cited by the parties shows that an order of disqualification must be based upon a substantial recitation of facts concerning the attorney's underlying participation in the matter about which he/she will testify. This recitation is done either by affidavit or by hearing evidence. See, Cannon, 669 F.Supp. at 100-01; Pain Prevention Lab, 657 F.Supp. at 1495-98; see also United States v. Castellano, 610 F.Supp. 1137 (S.D.N.Y. 1985) (noting this in the context of a criminal case). Several courts have indicated that the issue is best resolved after discovery has been completed. Cannon, supra; Paretti, supra.

The Seventh Circuit also has recently analyzed the propriety of disqualification pursuant to the strictures of Rule 3.7(a).

In United States v. Defazio, 899 F.2d 626 (7th Cir. 1990), the defendant was charged with bankruptcy fraud. The attorney representing the defendant had asssisted with the preparation of the bankruptcy schedules, and the government moved for the attorney's disqualification. The district court granted the motion, finding that the attorney might be called as a witness. The court of appeals affirmed, noting that "the justice system has an interest in not having a defense attorney be both advocate and witness regarding material issues." The court also stated:

> At the time [the trial judge] disqualified [the attorney] how likely was it that [the defendant] would raise an advice of counsel defense? Of course, as it turned out, [the defendant] did not raise the defense at trial, and [the attorney] did not testify. But this is unimportant, since we do not review the district court's decision with the advantage of hindsight. The defendant did have [the attorney] under subpoena during trial, though, which helps corroborate the trial judge's conclusion that his becoming a defense witness was a strong possibility.

> There is no question that [the defendant] might have asserted at least a partial defense based upon the content of [defendant's] Chapter 7 guidance.

Id. at 631 (emphasis in original) (citation omitted). Thus, although Rule 3.7 imposes a heavier burden than its predecessor, the movant need not establish with complete certainty that the attorney will testify. The burden lies somewhere between speculation and complete certainty.

III. DISQUALIFICATION OF GODLOVE

A. Count One

The plaintiff's Amended Complaint alleges in Count I that the Bamberger Defendants, William E. Jageman, and Jageman & McGraw, Inc., committed acts of legal malpractice in the handling of a particular lawsuit involving the plaintiff. At first glance, disqualification would appear unnecessary. Most of Count I merely recites what a docket sheet from that case could establish as having

occurred while Joan Godlove was the attorney handling that lawsuit, and while Godlove could testify to those matters, they can be proven by reference to the docket sheet. Moreover, the gist of the plaintiff's Amended Complaint is that after Godlove was terminated, the Bamberger firm took no action to complete the legal representation successfully. See Amended Complaint at Count I, ¶¶ 84-93.

At a hearing conducted on March 1, 1991, however, Godlove indicated that it would be necessary for the plaintiff to obtain other counsel to represent him with regard to Count I. This was followed by the filing on March 27, 1991, by attorney Robert S. Abdalian, of a Notice of Intent to File Application for Leave to Appear Pro Hac Vice as counsel for plaintiff as to Counts I, II, and IV. These two events demonstrate that Godlove realizes she is likely to become a witness with regard to

Count I, and provides a sufficient basis for finding that she must be disqualified as to that count.

B. Count Two

Count II, on the same facts recited in Count I, alleges that the defendants engaged in a constructive fraud against the plaintiff by violating certain fiduciary duties towards they held toward him. Count II does allege that Hahn disregarded his duty to the plaintiff by discharging Godlove at a critical time in the litigation, id. at Count II, ¶ 5, but it is not clear that Godlove will need to testify to establish this fact. It is undisputed that Godlove was terminated from the firm in July 1983; whether such action prejudiced the plaintiff in the underlying lawsuit is not a factual determination -- it is a matter requiring an opinion under Rule 702 of the Federal Rules of Evidence. Clearly, Godlove cannot testify as to such

an opinion in this case if she wishes to remain as an attorney of record, but her testimony is not necessary to establish any breach of duty regarding how the case was handled after July 1983. The plaintiff may obtain this testimony from another source, and Godlove's opinion is not "necessary."

Defendants maintain, however, that Godlove inevitably must testify as to Count II.[3] This position apparently is based on defendants' conclusion that Godlove's pre-discharge conduct as an associate of the Bamberger firm had some bearing on the firm's decisions in handling the plaintiff's underlying lawsuit after Godlove left. While the Court can conceive that such a defense might occur and such testimony might be necessary, there is insufficient evidence by way of specific

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[3] Defendants also make this argument with regard to Count I.

factual affidavit at this stage for the Court to ascertain that Godlove's testimony is "likely to be necessary." The defendants have a heavy burden to prove the necessity of calling Godlove, and they have provided nothing to date which satisfies that burden.

C. Count Four

Count IV alleges that attorneys Hahn, Berger, and Boxer intentionally deceived the plaintiff by their conduct during the litigation of the underlying claim. Specifically, this count alleges that "[Berger] intentionally induced Hahn to disregard those [fiduciary] duties, fire the associate [Godlove] on July 1, 1983, and represent Hutchinson and the plaintiff in a less than zealous manner after July 1, 1983." Amended Complaint at Count III, ¶ 4 (incorporated by reference at Count IV, ¶ 3). Count IV also alleges that "Berger's conduct in interfering with

Hutchinson's attorney-client relationship at various times before and after July 1, 1983 was unprivileged, unjustified, and motivated by actual malice, i.e., an illegitimate ulterior motive to aid Spanierman, Spanierman, Inc., Spanierman Gallery, and Kennedy Galleries in evading discovery and avoiding liability..." Id. at Count III, ¶ 5 (incorporated by reference at Count IV, ¶ 3) (emphasis added).

From these allegations, it appears reasonably likely that Godlove may be called to testify as to certain actions, taken before her termination, which she may have witnessed and which may have been a part of the pattern of deceit and collusion allegedly performed by certain defendants. However, on the record as currently developed, there again is an inadequate factual basis for concluding that Godlove's testimony would be anything more than cumulative of testimony by other witnesses. The

defendants have failed to meet the high burden of proof which is required before disqualification will be ordered.

D. Count Five

The allegations in Count V most directly relate to Godlove's personal participation as a witness in this case. Count V, which is denominated a "Civil RICO" claim under 18 U.S.C. § 1961, alleges that certain defendants engaged in a pattern of racketeering activity beginning in 1966 and continuing through April 13, 1990. A part of the pattern of activities specifically includes one telephone call to plaintiff's attorneys and a letter written to plaintiff's attorneys in April 1990. Not specifically alleged, but implicit in the Amended Complaint, is that other activities have occurred between July 1, 1983 and April 1990 which constitute other predicate acts upon which liability under 18 U.S.C. § 1961 is premised.

Godlove addresses these circumstances in paragraph 19 of her Affidavit. From this Affidavit, the Court concludes that the substance of the telephone call of April 12, 1990, is a matter which is in dispute, and is not cumulative of other witnesses' testimony. Moreover, it appears that two other lawyers from Godlove's firm (Roberts and Marrs) were present during the call, rendering it likely that all three may have separate recollections of the conversation. In recreating that conversation at trial, corroboration by more than one attorney seems likely if the contents of the conversation are at issue. The Court therefore concludes that there has been a sufficient factual reconstruction of the events as to Count V of plaintiff's Complaint to show that Godlove is reasonably likely to be called as a witness as to this count, and that her testimony will

not be cumulative. When there is doubt concerning whether an attorney should testify, doubt should be resolved in favor of the lawyer testifying and against her becoming an advocate. MacArthur v. Bank of New York, 524 F.Supp. 1205 (S.D.N.Y. 1981); Jackson v. Russell, 498 N.E.2d 22 (Ind. App. 1986). Godlove therefore must be disqualified as to Count V.

E. Severance of Counts

Another issue raised in the briefs and pleadings is whether Godlove may be disqualified as to Counts I and V, yet remain as counsel for the remaining counts of plaintiff's Amended Complaint. The Court concludes, for numerous reasons, that such a procedure would not be proper.

Initially, it is apparent that the allegations of Count I are inextricably related to Counts II, IV, and V, because they are incorporated into those counts by

reference.[4] In addition, Count V is a RICO claim in which the predicate acts are alleged to have begun in 1966 and continued until 1990. The events extending throughout that period cannot help but include the actions which form the basis of the legal claims in Counts I, II and IV. The policy reasons behind Rule 3.7 would be violated if plaintiff's counsel were to act as both witness and advocate with regard to the same factual matters.[5]

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[4] The plaintiff has been inconsistent in his arguments on this point. He utilized an incorporation by reference argument in a motion filed March 17, 1991, which sought discovery beyond Count V in a motion for deferment of ruling. This argument was contrary to the plaintiff's approach during a hearing held on March 1, 1991, at which time the plaintiff argued that each count stood on its own, and that the plaintiff could be represented by Godlove in some, but not all, of the counts. Simply put, the plaintiff is not entitled to have it both ways.

[5] Good statements of these reasons are found in Jackson v. Russell, 498 N.E.2d 22, 28-30 (Ind. App. 1986), and in EC 5-9 which, though no longer a part

Finally, the Court does not perceive that judicial economy would be advanced by severing Counts I and/or V from the other counts of the Amended Complaint. The factual basis is the same for all the counts, see Amended Complaint at Count V, ¶¶ 2-4, and severance essentially would require trial of the same case more than once. A fair review of the record shows that the counts are more related than separate and distinct, so Godlove must be disqualified as to all counts.

F. Hardship to the Plaintiff

Rule 3.7 also requires the Court to determine whether the disqualification of Godlove in this case will work a substantial hardship upon the plaintiff. In Jackson, Judge Ratliff of the Indiana Court of Appeals stated:

> Hardship alone is insufficient to permit continued representation

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of the Rules of Professional Conduct, still addresses their policy concerns.

> although deprivation to the client is usually the greatest precisely when the attorney is most intimately involved in the events giving rise to the suit. The hardship exception covered by subparagraph (4) of DR 5-101(B) ... involves a situation where a lawyer-client team comes unexpectedly upon a possible disqualification which they did not nor could not safeguard against. The hardship exception is not meant for a case where a possible disqualification was visible early on, but "the parties went right on increasing the helpless dependence of client upon lawyer." Instead, the duty to withdraw from representation is clearest when the need to be a witness is well known in advance. Therefore, absent "the distinctive value" of an attorney or his firm as counsel in a particular case, hardship alone will not be enough to prevent disqualification of an attorney where there is a conflict between acting as counsel or as a witness.

Jackson, 498 N.E.2d at 30 (citations and footnote omitted).

This language applies to the facts of the case at hand, and leads to a conclusion that the plaintiff will not face undue hardship due to Godlove's disqualification. The potential for Godlove to testify is apparent at an early stage of

the litigation, and plaintiff has brought forward no evidence showing that Godlove possesses unique expertise or other "distinctive value" in the types of claims at issue. Although Count V is arguably quite technical, the claims in Counts I, II and IV are not. It is true that Godlove has been involved with the plaintiff for a decade in attempting to establish facts to support his claim of ownership of an art collection, and it is also true that some courts have found substantial hardship where an attorney, due to such a lengthy relationship, has acquired extraordinary and irreplaceable familiarity with the client's affairs. Godlove's affidavit, however, fails to detail any such hardship that her disqualification would work to the plaintiff. Indeed, the more intimately involved Godlove becomes in the facts underlying the plaintiff's claimed interest in the art collection, and what legal

action should have been taken to protect that claim, the more likely it appears that she must become a witness as to the legal malpractice claim.

IV. DISQUALIFICATION OF THE FIRM

The Court next must discuss whether attorneys Roberts, Marrs, and Carson -- members of the firm with which Godlove is now of counsel -- must be disqualified from this action as well.[6] On the whole, it appears likely that Roberts and Marrs,

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[6] The Court is aware of a letter, dated January 8, 1992, in which Roberts, Marrs, and Carson disavowed any involvement in the plaintiff's case effective September 24, 1991. This letter prompted the defendants recently to withdraw their disqualification motion, insofar as it pertains to these three attorneys, but the Court believes it best to deny the withdrawal motion and proceed to analyze the firm's disqualification at this time. The critical events regarding disqualification occurred well before September 24, 1991, and it is likely that the disqualification of these three attorneys is likely to surface at some point anyway. Therefore, in the interest of completeness, caution, and judicial economy, the Court will address the issue now.

in addition to Godlove, may be called to testify regarding the important April 12, 1990 telephone call (discussed supra). Their testimony may be necessary to provide corroboration for Godlove's recollection of the content of the conversation. Thus, based upon Rule 3.7(a), and under the same analysis applied supra to Godlove,[7] the Court concludes that Roberts and Marrs must be disqualified as to Count V, and by extention, all other counts.[8]

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[7] It is important to note that paragraphs 11 and 12 of Count II and paragraph 4 of Count III (which describes events surrounding the termination of Godlove) are the only predicate acts specifically alleged as the basis of the plaintiff's claim under 18 U.S.C. § 1962. The facts surrounding the telephone call and the precise words used are likely to be in dispute, so it is clear that more than one of the plaintiff's attorneys might be called for corroborative purposes -- not just as cumulative witnesses.

[8] The Court's determination rests on this basis, and not upon any "imputed" disqualification issue as to Roberts and Marrs.

Carson is also a member of the firm with which Godlove is of counsel, and he has entered an appearance in this case; however, he did not participate in the April 12, 1990 telephone conversation. His disqualification therefore is not required. Disqualification of one member of a firm does not necessitate the disqualification of the entire firm; Rule 3.7(b) provides that Carson may act as an advocate this cause of action unless precluded from doing so by Rule 1.7 or 1.9 of the Rules of Professional Conduct, neither of which applies here.[9] No facts indicate that Godlove, Roberts, Marrs, or Carson have conflicts of interest with respect to the plaintiff in this case; as a result, Carson may continue as counsel.[10]

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[9] It appears that Carson is not admitted to practice in the Southern District of Indiana; he therefore must take appropriate steps if he is to represent the plaintiff in this case.

[10] Although the Court has denied the motion to disqualify Carson at this time, such a decision may have to be

Despite Carson's possible continued role, it is clear that Godlove, Roberts and Marrs should be restricted -- to the

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reconsidered if further discovery should conclude that Carson is, in fact, a necessary witness, and that his testimony will be more than cumulative. Plaintiff is urged to consider carefully at this stage whether Carson will be called to testify. Should the evidence compel his testimony at a later date --perhaps even at trial -- this Court may have no option but to disqualify Carson. Case law indicates that the mere fact that an attorney has spent considerable time preparing the case or has special expertise in the area of law at issue, cannot establish "hardship" that will prevent disqualification. See Jackson, 498 N.E.2d at 29-33. Further, in cases where a conflict has been foreseeable for a long period of time (which is true in this case), the fact that a trial date is imminent will likewise not constitute hardship that will allow the attorney to continue in a role as advocate. A motion to disqualify at such a late date could only result in one of three options: (1) a delay of the trial while a new attorney prepared, resulting in considerable expense to all parties; (2) a mistrial, again at enormous expense to all parties; or (3) an order for the plaintiff to proceed without counsel. None of those options would advance justice. Therefore, although the Court does not disqualify Carson at this time, it strongly urges plaintiff to consider whether prudence does not dictate the retention of new counsel now.

greatest extent possible -- from participation in the discovey process. Disqualification relates to participation in the discovery phase of litigation as well as in the literal "trial" before a jury. See General Mill Supply Co. v. SCA Servs., Inc., 697 F.2d 704, 716 (6th Cir. 1982). By limiting these attorneys' participation, the Court will be able to limit the possibility that Carson will be arguing solely as their "mouthpiece," thereby relieving the jury of the difficult task of deciding when counsel is vouching for the credibility of a witness, and when he is vouching for the credibility of a business partner.

V. CONCLUSION

For the reasons discussed above, defendants' motion to disqualify attorneys Joan Godlove, C. Clay Roberts, and Richard D. Marrs is GRANTED, and these attorneys are hereby DISQUALIFIED from representing the plaintiff with regard to any claim in this

cause. Defendants' motion to disqualify is DENIED insofar as it pertains to attorney Russell D. Carson, but Carson is ORDERED, in keeping with his ethical responsibilities under Rule 3.7 of the Rules of Professional Conduct, to conduct any discovery and trial of this case in a manner that will minimize, to the greatest extent possible, any reference to or involvement by attorneys Godlove, Roberts, and Marrs.

Defendants' counsel and Russell D. Carson are **ORDERED** to appear before the Honorable William G. Hussmann, Jr., United States Magistrate Judge, on April 22, 1992, at 2:30 o'clock p.m., Evansville time (CDT), in Room 328 in the Federal Building, Evansville, Indiana, for a status conference in this matter.

SO ORDERED this 6th day of April, 1992 at Evansville, Indiana.

/s/
LARRY J. McKINNEY, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

THOMAS R. HUTCHINSON, Individually and as Personal Representative of the Estate of Robert W. Hutchinson, deceased,	)	
Plaintiff,	)	
vs.	)	CAUSE NO. EV 90-44-C
IRA SPANIERMAN, et al.,	)	
Defendants.	)	

ORDER ON VARIOUS MOTIONS

Plaintiff Thomas Hutchinson has moved for reconsideration of this Court's Order of April 6, 1992, disqualifying attorney Joan Godlove from representing the plaintiff in this matter. The Court, being duly advised, DENIES the motion. Plaintiff shall have to and including October 4, 1992 in which to respond to the Bamberger defendants' motion for summary judgment filed April 29, 1992. Any reply must be filed on or before October 15, 1992.

The motion of Anne E. Hutchinson to be joined as a party plaintiff is GRANTED. The Court ORDERS that Anne E. Hutchinson be joined as a party plaintiff in her individual capacity, and that the caption of this case be amended to reflect said joinder.

The Bamberger defendants have requested this Court to take judicial notice of all pleadings, discovery, discovery responses, depositions, and all other motions, orders, and papers constituting the file and record in Hutchinson v. Thompson, No. EV 80-104-C, United States District Court, Southern District of Indiana, Evansville Division. This motion is GRANTED, on the condition that any reference to these materials in pleadings in this cause be specifically noted and cited.

SO ORDERED this 3 day of September, 1993.

/s/
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, deceased,	)	
Plaintiff,	)	
vs.	)	CAUSE NO. EV 90-43-C
LAWRENCE E. MILLER, as Successor Personal Representative of the Estate of Margaret L. Thompson, deceased; EARL H. RICHERT, as Personal Representative of the Estate of Gordon Sterling Thompson, deceased; IRA SPANIERMAN; and IRA SPANIERMAN, INC.,	)	
Defendants.	)	

ORDER

This matter is before the Court on motions by defendants Ira Spanierman and Ira Spanierman, Inc., and by non-parties Charles Berger and Bamberger Foreman Oswald & Hahn, Robert Hahn and Rita Deere. These motions seek protective orders

delaying discovery directed toward them until the Court rules on a pending motion for summary judgment in companion case Hutchinson v. Spanierman, No. EV 90-44.

The Court recognizes that it only recently lifted a stay on discovery in this cause, but after consideration believes that judicial economy and justice will be served by reinstating the stay for a short period. The movants point out correctly that resolution of the motion in EV 90-44 will impact the posture of this case, and depending upon that resolution, the discovery requested here might be unduly burdensome, or even unnecessary. It therefore makes sense for the Court to resolve that motion before requiring the movants to comply with plaintiff's substantial discovery requests.

Accordingly, IT IS ORDERED that all discovery in this cause shall be STAYED until the motion for summary judgment

filed on April 29, 1992 by Bamberger Foreman Oswald & Hahn, Robert Hahn, and Rita Deere in Hutchinson v. Spanierman, EV 90-44, is resolved by the Court.

SO ORDERED this 6 day of October, 1992.

/s/
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

THOMAS R. HUTCHINSON, et al.,	)	
Plaintiffs,	)	
vs.	)	CAUSE NO. EV 90-44-C
IRA SPANIERMAN, et al.,	)	
Defendants.	)	

ORDER STAYING PROCEEDINGS

This matter is before the Court on its own motion. For the reasons discussed in the Court's "Order Lifting Stay on Discovery," issued today in Hutchinson v. Thompson, No. EV 90-43-C, and pursuant to this Court's inherent power to do so, See Landis v. North Am. Co., 299 U.S. 248, 254-57 (1936), all further proceedings in this case (with the specific exception of those matters dealt with today by other orders of the Court) are STAYED. This stay shall remain in effect until further

order of the Court after resolution of all substantive issues in EV 90-43-C.

SO ORDERED this 17 day of August, 1993.

/s/
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, deceased,	)	
Plaintiff,	)	
vs.	)	CAUSE NO. EV 90-43-C
GORDON THOMPSON, MARGARET ANN THOMPSON LYNCH, IRA SPANIERMAN, and IRA SPANIERMAN, INC.,	)	
Defendants.	)	

ORDER LIFTING STAY ON DISCOVERY

This matter is before the Court on its own motion. By separate order today in companion case Hutchison v. Spanierman, EV 90-44-C, the Court denied a motion styled "Plaintiffs' Request that Court Take Judicial Notice of Fact that [Chief] Judge Brooks and Magistrate [Judge] Hussman Lacked Jurisdiction to Enter Orders Staying Discovery in 1991," which plaintiffs filed April 6, 1993. See Order on Request for Judicial Notice Re: Jurisdiction, EV 90-44-C (Aug. 17, 1993).

Although that motion was denied, it was not without impact, because it has caused the Court to reevaluate the current stays on discovery in this case and EV 90-44-C, as well as the factual grounds for those stays. This case and EV 90-44-C were transferred to the docket of this Court in December 1991. Discovery was stayed in EV 90-44-C at the time of the transfer, and was stayed in this case shortly afterward. See Scheduling Order, EV 90-43-C (Jan. 21, 1992). These stays were enacted to allow the Court time to rule on pending motions in each case to disqualify plaintiffs' attorney, Joan Godlove, although the exact time constraints of the stays were not made clear. The motions to disqualify were resolved by orders issued in February 1992 in this case, and April 1992 in EV 90-44-C. However, the stay on discovery in each case remained in effect.

On August 25, 1992, the Court, seeing no reason why discovery should not pro-

ceed, lifted the stay in this case. See Entry, No. EV 90-43-C (Aug. 15, 1992). By October 6, 1992, however, the Court became convinced that a summary judgment motion in EV 90-44-C, filed in April 1992 by the Bamberger defendants, should be decided before discovery went forward in this case. The Court therefore reinstated the stay. See Order, No. EV 90-43-C (Oct. 6, 1992). Later, the Court reaffirmed its opinion that the motion for summary judgment in EV 90-44-C should be resolved before anything else proceeded in either that case or this one by renewing the stay on discovery in EV 90-44-C. See Order on Various Motions, EV 90-44-C (Jan. 28, 1993), at 4.

Review of the files in both cases have led the Court to reconsider this conclusion. The Court now believes that this case, for reasons of both logic and judicial economy, should be resolved without

further delay, and that proceedings in EV 90-44-C should be stayed until such resolution is reached. The reasons for this decision are embodied in an argument that plaintiffs have made previously in EV 90-44-C:

> The Court's [staying of proceedings in EV 90-44-C pending a decision in EV 90-43-C] should allow the parties to avoid unnecessary costs and delay and would be in furtherance of judicial economy. Moreover, if the judgment in [EV 80-104-C] is set aside, plaintiff's claim for damages against his former attorneys [in EV 90-44-C] would be significantly reduced because plaintiff would be in a position to pursue the remedy sought when the 1980 action was filed, i.e., voluntary, or if necessary, judicial partition of objects which were part of the Theodore Robinson Collection in jurisdictions where those objects are now located.

Plaintiff's Motion for a Stay of Proceedings, EV 90-44-C (Dec. 11, 1991), at 2.

This reasoning, although initially rejected, see Order EV 90-44-C (April 5, 1993), on reconsideration seems quite correct. If the judgment in EV 80-104-C is vacated as a result of the prosecution of

this case, the posture of EV 90-44-C, at least in terms of damages, will be dramatically altered. Even if the EV 80-104-C judgment is not vacated, however, EV 90-44-C still will be affected -- particularly with regard to the weight of the parties' arguments on causation, as discussed in the Bamberger defendants' motion for summary judgment in that case. Given these facts, the Court believes that this case and EV 90-44-C can be resolved in orderly fashion only if this case goes forward, and EV 90-44-C is entirely stayed until this case is resolved.

Accordingly, the Court ORDERS the stay on discovery in this case LIFTED, subject to the temporary stay of all further proceedings (pending a decision on plaintiff's challenge to the Court's denial of his motion for recusal) enacted by separate order today. See Order on Motions for Recusal of Presiding Judge, Nos. EV

90-43-C & EV 90-44-C (Aug. 17, 1993), at 12-13.[1]

SO ORDERED this 17 day of August, 1993.

/s/
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

[1] The Court is mindful of the defendants' oft-repeated concerns of confidentiality with regard to discovery. These concerns may be voiced by way of objection and, where appropriate, by motions for protective orders and the like. Individual disputes will be dealt with as they arise.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

THOMAS R. HUTCHINSON, et al.	)	
Plaintiffs,	)	
vs.	)	CAUSE NO. EV 90-0044-C
IRA SPANIERMAN, et al.,	)	
Defendants.	)	

ORDER

The Court has todey, January 19, 1995, entered an order in Hutchinson v. Thompson, et al, No. EV-90-43-C, calling for status reports and proposals from the parties for moving the case forward. A copy of that order is attached. As the order indictes, the Court at this time intends to leave in place Judge McKinney's stay in this case, No. EV-90-44-C. However, the parties to this case may comment on that approach and/or the proposals of any party submitted in No. EV 90-43-C. The parties to this case shall submit any

comments on or before [Friday], February 24, 1995.

So ordered.

Date: 1/19/95

/s/
DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

NO. 89-2722

JOAN GODLOVE,

Plaintiff-Appellant,

v.

BAMBERGER, FOREMAN, OSWALD, AND HAHN, a general partnership, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
No. 85-C-192 - William L. Beatty, Judge*

ARGUED APRIL 11, 1990
DECIDED JUNE 6, 1990

Before WOOD, JR., EASTERBROOK, and KANNE, Circuit Judges.

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* The Honorable William L. Beatty, United States District Judge for the Southern District of Illinois, was assigned to this case after every judge in the Southern District of Indiana recused himself or herself.

HARLINGTON WOOD, JR., Circuit Judge.

There is an old adage that "one who is his own lawyer has a fool for a client."[1] So it is in this case even though plaintiff, Joan Godlove, is a summa cum laude graduate of the Indiana University School of Law, and a member of the bar. This lawyer should have declined to represent this client.

Plaintiff was hired as an attorney by the defendant law firm, Bamberger, Foreman, Oswald & Hahn, in January 1981 and fired in July 1983. In June 1985, she brought this pro se action against her former firm and certain named partners alleging on eight different grounds that her dismissal was unjust. The defendant law firm wisely took heed of the adage and secured outside legal assistance.

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[1] Faretta v. California, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting).

I. CASE HISTORY

There is no need to set forth all the pretrial exercises detailed in the record which is a foot and a half high, but some background is necessary.[2] Plaintiff began this diversity action in June 1985 with a fifty-three page complaint. The district court dismissed the complaint, characterizing it as a "lengthy meandering" statement of facts, with much "irrelevant material" and "bordering on being scandalous." In granting leave to file an amended complaint, the court made clear what is expected in a complaint. The amended complaint was also fifty-three pages long. The court let it stand, but our comparison of the two complaints evidences little regard for the court's advice and the customary requirement for "a short and plain

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[2] We accept plaintiff's figures that there are over three-hundred pleadings and orders in the record.

statement of the claim . . . ." Fed.R. Civ.P. 8(a).[3] In December 1986 the court dismissed with prejudice Counts I, II, IV, and V of the amended complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). The other counts, III, VI, VII, and VIII remained. In July 1989 the district court, upon the second application by defendants for sanctions under Fed. R. Civ. P. 37, dismissed "this cause of action"

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[3] The amended complaint alleged the following claims:

> I. Breach of Employment Contract; II. Unjust Dismissal in Retaliation for the Exercise of Protected Activities; III. Violation of the Equal Pay Act (29 U.S.C. § 206(d)(1)); IV. Interference with Contractual Relations; V. Violation of the Indiana Service Letter Statute (Ind. Code § 22-6-3-1); VI. Violation of the Indiana Blacklisting Statute (Ind. Code § 22-5-3-1); VII. Violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.); and VIII. State Common Law Claim for Interference with Prospective Advantage.

with prejudice at plaintiff's costs. Plaintiff raises on appeal the 12(b)(6) dismissal of Counts II and V (Counts I and IV are abandoned), and the rule 37 dismissal of the cause of action.

Although we view the appeal of the 12 (b)(6) dismissals to be without merit, we need only consider the rule 37 dismissal sanction for which purpose the district judge considered the whole record and particularly the discovery difficulties. That sanction took with it Counts II and V whether they had been properly dismissed previously under 12(b)(6) or not. The district court found that each step of the discovery process had been a "monumental exercise" in briefs, motions, and extensions of time, and concluded that plaintiff had "willfully and deliberately" ignored and refused to obey the orders of the court. We must look briefly at some of the events that led to the district

court's conclusion. A mere outlining of a portion of the record will serve to justify the dismissal.

> February 5, 1987--Defendants served on plaintiff their first request for production of documents containing twelve particular items. Plaintiff received an agreed extension of time and then objected to all the items sought. In September 1987, the district court found one of plaintiff's "wholesale" objections to be "specious" and that the others "bordered on being frivolous."
>
> June 12, 1987--After the parties failed to resolve their document production problems, defendants filed a motion to compel production.
>
> June 14, 1987--Plaintiff served on defendants a response offering to produce some of the documents requested but only on condition that defendants' counsel furnish her a statement "indicating that his client would furnish plaintiff with documents she wanted."
>
> September 3, 1987--After receiving additional extensions of time plaintiff filed her brief in opposition to defendants' motion to compel production.
>
> September 28, 1987--The district court overruled all of plaintiff's objections except two, a claim of attorney-client privilege and a work product objection. The district court ordered plaintiff to submit to the court for in camera examination those documents she claimed were protected by the attorney-client

privilege. The court also ordered plaintiff to submit to the court and defendants' counsel a list of the claimed work product items, identifying them in sufficient detail to enable the court to rule on that objection. The district court also commented that plaintiff appeared to completely misapprehend discovery.

October 26, 1987--Plaintiff responded to the district court's September 28 order by letter in which she informed the court she was refusing to submit any material for in camera inspection and was claiming as work product items only those notes she had made in anticipation of litigation.

November 4, 1987--The district court ordered that plaintiff's second set of interrogatories be stricken and that she pay defendants' fees and costs related to the interrogatories because of the number, the irrelevance of many of them, and because they went beyond the scope of reasonable discovery contemplated by the rules. The court subsequently held a hearing on the amount of the fees and costs, but plaintiff advised the court she would not pay the expenses pending the outcome of a final appeal in the case.

November 23, 1987--Plaintiff served her "Plaintiff's Post-Ruling Response to Defendant's First Request for Production of Documents." In that pleading she ignored some of defendants' requests, partially responded to one request, and again raised her prior objections.

December 8, 1987--Defendants applied for rule 37 assistance because of plaintiff's failure to comply with certain of the requests as ordered by the district court.

December 23, 1987--The court issued an order responding to the defendants' rule 37 sanction request. The district court expressed its difficulty in believing that plaintiff would deliberately ignore the court's prior order but excused plaintiff on the assumption that her refusal to comply resulted from some type of misunderstanding. The court then specifically and plainly directed plaintiff to respond to the various requests within certain time limits. Failure to do so, the court warned, would result in the court's proceeding to consideration of the rule 37 relief sought by defendants.

December 24, 1987--After defendants' attempts to arrange plaintiff's deposition had failed, the district court issued an order scheduling plaintiff's deposition for January 21, 1988. Plaintiff failed to appear after giving notice to opposing counsel only that morning. There were further difficulties before defendants were finally able to take her deposition.

February 3, 1988--After plaintiff failed to comply with the December 1987 order, defendants filed their "Request that Court Proceed on Defendants' Request for Rule 37 Relief."

March 3, 1988--The district court wrote plaintiff, noting her disregard of its orders and advising her that unless she responded to the orders immediately,

the court would rule on defendants' application for rule 37 relief.

December 21, 1988--the district court struck a number of plaintiff's 180 requests for admissions by defendants, commenting in its order that plaintiff's requests were prolix, argumentative, and appeared to be aimed more at harassing and embarrasing the individuals to whom the requests were directed than at simplifying the issues.

March 31, 1989--Defendants reported that plaintiff had still not complied, and the court suggested defendants file a current application for rule 37 relief.

April 14, 1989--Defendants filed their second application for rule 37 relief specifically seeking dismissal with prejudice and their costs.

June 14, 1989--Briefing on the second application was completed.

July 7, 1989--After considering the procedural history of the case, the district court issued its order as a rule 37 sanction dismissing plaintiff's cause of action with prejudice.

In addition to the problems outlined above, the record reveals that plaintiff also resisted various orders of the court by moving to reconsider and vacate about a half-dozen of those orders. One order

plaintiff sought to vacate was a denial of her request that defendant firm be required to notify its clients of her cause of action and her assertion in behalf of defendants' clients of the attorney-client privilege and work product doctrine. That effort of hers was unsuccessful. Plaintiff also filed two interlocutory appeals, both of which this court dismissed on its own motions. In one appeal, plaintiff sought to require all the district judges in Indiana who had disqualified themselves to give the reasons for their disqualifications. In the other, plaintiff expressed her dissatisfaction with not getting an extension of time to file a brief on the work product issue.

II. ANALYSIS

After considering that brief outline of the procedural history and plaintiff's conduct of her own case little more should

be needed to justify what a very patient trial judge, experienced on both the state and federal benches, felt compelled to do. Plaintiff left him no alternative but to dismiss her suit. Plaintiff's recalcitrance and obstruction of the case she initiated cannot be tolerated particularly from one who should know better.

For this appeal plaintiff did secure counsel who well represented his client in a difficult situation. Plaintiff's counsel sets forth the basic sanction law.[4] Whether to sanction and the sanction to be imposed are decisions entrusted to the discretion of the district court, Patterson v. Coca-Cola Bottling Co., 852 F.2d 280, 283 (7th Cir. 1988) (per curiam). The "discretion given to the district

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[4] Plaintiff observes that the underlying discovery orders, the disobeying of which give rise to a sanction, must themselves be correct, but plaintiff does not challenge the underlying discovery orders in this case.

court is broad," Tamari v. Bache & Co., 729 F.2d 469, 472 (7th Cir. 1984). That discretion, however, "is not unfettered." Scheilling [sic] v. Walworth County Park & Planning Comm'n, 805 F.2d 272, 275 (7th Cir. 1986). The sanction must be "just" and specifically related to the particular claim at issue in the discovery order. Insurance Corp. of Ireland, Ltd. v. Compagnie des Baxites [sic], 456 U.S. 694, 707 (1984) [sic]. It must also be remembered that unexcused and willful violations justify harsh sanctions up to and including dismissal with prejudice. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam). It is plaintiff's position against that legal backdrop, though it is conceded that she failed to comply with the court's discovery orders, that the most severe sanction -- the "draconian sanction of dismissal" -- was not

justified. We view the district court's decision to impose rule 37 sanctions under an abuse of discretion standard. Magnus Elec. v. Masco Corp., 871 F.2d 626, 631 (7th Cir. 1989).

To support that position plaintiff raises several arguments. It is implied in plaintiff's briefs that since her trial court actions were pro se that circumstance should be considered. Ordinarily, we treat the efforts of pro se applicants gently, but a pro se lawyer is entitled to no special consideration.

Plaintiff argues that her refusal to comply with the discovery orders was "not made in a fit of intransigence," but resulted from her "heartfelt belief" that her compliance would violate duties imposed on her by the Rules of Professional Conduct governing members of the Indiana bar and would result in a waiver of the work product doctrine and the attorney-

client privilege. Plaintiff undertook to make those decisions for the court. She refused to afford the court the ordered opportunity for in camera examination or to submit a list of what she claimed were work product materials. Plaintiff need not further concern herself with those doctrines as for her they are no longer at risk. It was the district court, not plaintiff, that had the responsibility to make those discovery production determinations on the merits.

Plaintiff also complains she was sanctioned without benefit of a hearing. Plaintiff had ample opportunity to respond to the court's orders, and her refusals were clear. No other hearing was needed to go over once again the discovery impasse caused by plaintiff. Whether to hold a hearing before imposing sanctions is a matter of the sound discretion of the trial court. There was nothing left for

the court to do at a formal hearing except waste more time of the court and defendants. There was no abuse of discretion. Margolis [sic] v. Johnson, 587 F.2d 885, 888-89 (7th Cir. 1978). We decline plaintiff's invitation to revisit that decision.

Plaintiff had been amply warned about the increasing likelihood of sanctions. She should have foreseen the possibility of dismissal. In the second request for rule 37 relief filed on April 14, 1989, defendants specifically asked for dismissal with prejudice. Any last minute change of mind by plaintiff to partially comply, to the limited extent she saw fit, with the court's order was too little too late. Plaintiff can not dictate her own terms of compliance with the court's order. Plaintiff may compromise with the defendant but not with the court. Her in-

adequate last minute "compliance" attempt was properly rejected.

Plaintiff claims that the district court should have experimented with some lesser sanction before dismissal. Plaintiff overlooks that an earlier monetary sanction was imposed but she promptly notified the court she would not pay until after she had taken an appeal. The first sanction obviously had no curative impact on her. She continued to be obstructive. There is no reason to believe that some other sanction would have been effective in causing plaintiff to progress in an orderly fashion with this litigation. The district judge is not to be faulted now for his patient efforts with plaintiff, nor will we be drawn into quibbling about a phase [sic] or two of the district judge taken out of context which plaintiff now claims misled her in some way to expect something less than dismissal.

After our own examination of the entire record, it would be impossible to come to any other conclusion than that plaintiff willfully and deliberately chose to ignore and refuse to obey the court's orders. Societe Internationale v. Rogers, 357 U.S. 197, 212 (1957), limits sanctions to situations where the noncompliance is willful and not due to inability of the party to comply. We see nothing but willfulness in this record. Plaintiff does not dispute her noncompliance was deliberate. Her excuse is only that she knew better than the district judge what response she should make. The district court concluded that after more than eighteen months of intransigence, resistance and disregard of court orders that no other sanction could be meaningful. We see no factual findings by the district court which could reasonably be considered clearly erroneous. Handamon [sic] v. National-Ben Franklin Life Ins.

Corp., 677 F.2d 617, 621 (7th Cir. 1982). The facts justifying dismissal are vividly apparent on the face of the record.

This court has recognized that the choice of sanctions is primarily the responsibility of the district judge, Patterson, 852 F.2d at 283. Sanctions are reviewed under a differential standard. No matter the standard of review, in this case, even under the strict de novo standard of review, we could not but approve the imposition of the dismissal sanction. National Hockey League, 427 U.S. at 640-41. The district court could have abused its discretion only in declining to impose the dismissal sanction with prejudice to bring an end to plaintiff's attempt to manipulate the progress of her case to suit herself. This is not a case as in our recent case of Diehl v. H.J. Heinz Co., No. 89-2165 (7th Cir. Apr. 14, 1990) in which this court determined that the

condition imposed by the district court was so unreasonable that it could not be complied with and therefore failure to comply did not justify sanctions.

The district court's decision under rule 37 to sanction plaintiff by dismissing her case with prejudice is affirmed. We remand to the district court for such further proceedings as may be necessary in relation to costs.

AFFIRMED.

Unites States Constitution:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 28:

§ 455. Disqualification of justice, judge or magistrate

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter

in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, amd make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civil organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been

devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances.

Federal Rules of Civil Procedure:

Rule 16. Pretrial Conferences; Scheduling; Management

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting

any unrepresented parties by scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file motions; and

(3) to complete discovery.

The scheduling order may also include

(4) modifications of the time for disclosures under Rule 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(5) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(6) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served upon a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

Rule 55. Default

(a) Entry. When a party against whom a judgment for affirmative relief

is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit, or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment

or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of

the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Indiana Rules of Professional Conduct:

Rule 3.7. Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualifiction of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

(3) Supplement

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

In re Thomas R. Hutchinson, individually and as the Personal Representative of the Estate of Robert W. Hutchinson, deceased, and Anne E. Hutchinson, individually,	))))	No. 94-2129

NOTICE OF REASSIGNMENT OF CASES TO SUCCESSOR DISTRICT JUDGE

On page 31 of the Petition for Writ of Mandamus to the United States Court of Appeals for the Seventh Circuit, which was docketed in this Court on February 22, 1995, note is made of the fact that the actions pending in the United States District Court for the Southern District of Indiana were transferred from the Honorable Larry J. McKinney, the successor district judge who had been asked to disqualify himself, to a third district judge after the Seventh Circuit denied the Petition for Rehearing petitioners had filed.

On March 23, 1995, one month after the Clerk of this Court refused to docket the aforementioned Petition for Writ of Mandamus on grounds that it had not been filed within the time prescribed by 28 U.S.C. § 2101(c), petitioners were notified by the Clerk of the United States District Court for the Southern District of Indiana that the Indiana actions had been reassigned to the docket of the Honorable Larry J. McKinney, pursuant to Local Rule 40.1(g).[1]

Information about this development is being provided to the Court because it may conceivably affect the outcome of this case.

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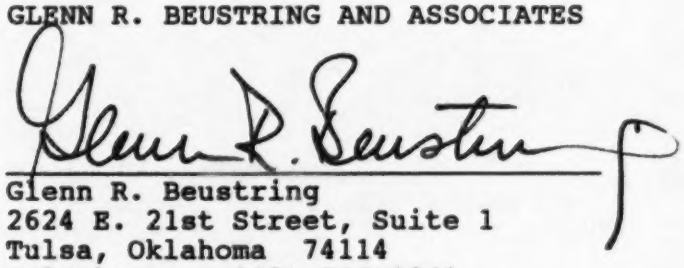
[1] This rule provides that "[w]hen required by considerations of workload, in the interest of expeditious administration of justice, the Court by order may reassign cases among the Judges."

2 pp

See Board of License Commissioners of Town of Tiverton v. Pastore, 469 U.S. 238, 240 (1985) (counsel "have a 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation"), quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring).

Respectfully submitted,

GLENN R. BEUSTRING AND ASSOCIATES



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